2005

Ted Duke v. Randal Graham : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

TED DUKE, an individual; and MARIA DEL CARMEN SAVALA CARDENAS, an individual,	:	Supreme Court Case No. 20051036-SC
Plaintiffs-Appellants,	:	Oral Argument Priority No. 15
vs.	:	
RANDAL GRAHAM, an individual; and DAVID GRAHAM, an individual,	:	Trial Court Civil Case No. 040925274 Judge John Paul Kennedy
Defendants-Appellees.	:	

APPELLANTS' OPENING BRIEF

APPEAL

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(Oral Argument and Published Decision Requested)

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Pursuant to Utah Rule of Appellate Procedure 24(a), Appellants Ted Duke and Maria Del Carmen Savala Cardenas (hereinafter "Appellants"), by and through their undersigned counsel of record John Martinez, hereby submit the following Opening Brief:

LIST OF PARTIES

The parties to this appeal are identified in the caption herein.

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UTAH CONSTITUTION

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JURISDICTION OF THE SUPREME COURT

The Utah Supreme Court has jurisdiction in this matter pursuant to Utah Code §78-2-2(3)(j)(2002)(appeal from final judgment).

ISSUES AND STANDARDS OF REVIEW

ISSUE I. Did the trial court violate Sections 48-2c-710(3) and 48-2c-809 of the Utah Revised Limited Liability Act by summarily confirming an arbitrator's award expelling both Appellants as members--and removing Appellant Duke as manager--of a limited liability company, even though such Sections expressly require that a "court" make an independent "judicial determination" about whether such sanctions should be imposed? (R. 371; Addendum Exh. 4, Transcript of trial court hearing, Friday, October 14, 2005, ll. 14-17, p.184)

Standard of Review: The proper interpretation and application of a statute is a question of law which is reviewed for correctness. No deference is afforded to the district court's legal conclusions. Grynberg v. Questar Pipeline Co., 2003 UT 8, ¶ 23, 70 P.3d 1 (matter of law reviewed for correctness); Gutierrez v. Medley, 972 P.2d 913, 914-915 (Utah 1998)(correctness standard).

ISSUE II. Did the trial court violate the Due Process and Open Courts Clauses of the Utah Constitution by summarily confirming an arbitrator's award expelling both Appellants as members--and removing Appellant Duke as manager--of a limited liability company, even though such Clauses guarantee Appellants a "day in court" for an independent judicial determination about whether such sanctions should be imposed? (R. 371; Addendum Exh.

4, ll. 14-17, p.184)

Standard of Review: The proper interpretation and application of a statute is a question of law which is reviewed for correctness. No deference is afforded to the district court's legal conclusions. Grynberg v. Questar Pipeline Co., 2003 UT 8, ¶ 23, 70 P.3d 1 (matter of law reviewed for correctness); Gutierrez v. Medley, 972 P.2d 913, 914-915 (Utah 1998)(correctness standard).

ISSUE III. Did the trial court err by confirming the arbitrator's award herein, even though the arbitrator made no findings to support such award and thereby failed to "make a record" as required by Section 78-31a-120 of the Utah Arbitration Act?

Standard of Review: The proper interpretation and application of a statute is a question of law which is reviewed for correctness. No deference is afforded to the district court's legal conclusions. Grynberg v. Questar Pipeline Co., 2003 UT 8, ¶ 23, 70 P.3d 1 (matter of law reviewed for correctness); Gutierrez v. Medley, 972 P.2d 913, 914-915 (Utah 1998)(correctness standard).

ISSUE IV. Did the trial court err by refusing to award Appellants their attorney fees, costs and interest as required by Section 78-31a-126(3) of the Utah Arbitration Act?

Standard of Review: The proper interpretation and application of a statute is a question of law which is reviewed for correctness. No deference is afforded to the district court's legal conclusions. Grynberg v. Questar Pipeline Co., 2003 UT 8, ¶ 23, 70 P.3d 1 (matter of law reviewed for correctness); Gutierrez v. Medley, 972 P.2d 913, 914-915 (Utah 1998)(correctness standard).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF CENTRAL IMPORTANCE TO THIS APPEAL

UTAH CONST. art. I, § 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

UTAH CONST. art. I, § 11. [Courts open -- Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

UTAH CONST. art. VIII, § 1. [Judicial powers -- Courts.]

The judicial power of the state shall be vested in a supreme court, in a trial court of general jurisdiction known as the district court, and such other courts as the Legislature by statute may establish. The Supreme Court, the district court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute.

UTAH CODE § 48-2c-710. Expulsion of a member.

A member of a company may be expelled:

(1) as provided in the company's operating agreement;

(2) by unanimous vote of the other members if it is unlawful to carry on the company's business with the member; or

(3) on application by the company or another member, by judicial determination that the member:

(a) has engaged in wrongful conduct that adversely and materially affected the company's business;

(b) has willfully or persistently committed a material breach of the articles of organization or operating agreement or of a duty owed to the company or to the other members under Section 48-2c-807; or

(c) has engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member.

UTAH CODE § 48-2c-809. Removal by judicial proceeding.

(1) The district court of the county in this state where a company's designated office is located, or if it has no designated office in this state, its registered office is located, may remove a manager of a manager-managed company in a proceeding commenced either by the company or by its members holding at least 25% of the interests in profits of the company if the court finds that:

(a) the manager engaged in fraudulent or dishonest conduct or gross abuse of authority or

discretion with respect to the company; and
(b) removal is in the best interests of the company.
(2) The court that removes a manager may bar the manager from reelection for a period prescribed by the court.
(3) If members commence a proceeding under Subsection (1) above, they shall make the company a party defendant.
(4) Subsections (1), (2), and (3) shall also apply to enable the removal of a member in a member-managed company from having any management authority or powers on behalf of the company.
(5) If the court orders removal of a manager or member under this section, the clerk of the court shall deliver a certified copy of the order to the division for filing.

UTAH CODE § 78-31a-120. Award.
(1) An arbitrator shall make a record of an award. The record must be signed or otherwise authenticated by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.
(2) An award must be made within the time specified by the agreement to arbitrate or, if not specified in the agreement, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree on the record to extend the time. The court or the parties may do so within or after the time specified or ordered. A party waives any objection that an award was not timely made unless the party gives notice of the objection to the arbitrator before receiving notice of the award.

UTAH CODE § 78-31a-124. Vacating an award.
(1) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:
(a) the award was procured by corruption, fraud, or other undue means;
(b) there was:
(i) evident partiality by an arbitrator appointed as a neutral arbitrator;
(ii) corruption by an arbitrator; or
(iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
(c) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 78-31a- 116, so as to substantially prejudice the rights of a party to the arbitration proceeding;
(d) an arbitrator exceeded the arbitrator's authority;
(e) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising an objection under Subsection 78-31a-116(3) not later than the beginning of the arbitration hearing; or
(f) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 78-31a-110 so as to substantially prejudice the rights of a party to the

arbitration proceeding.
(2) A motion under this section must be filed within 90 days after the movant receives notice of the award pursuant to Section 78-31a-120 or within 90 days after the movant receives notice of a modified or corrected award pursuant to Section 78-31a-121, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the movant.
(3) If the court vacates an award on a ground other than that set forth in Subsection (1)(e), it may order a rehearing. If the award is vacated on a ground stated in Subsection (1)(a) or (b), the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in Subsection (1)(c), (d), or (f), the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in Subsection 78-31a-120(2) for an award.
(4) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending.

UTAH CODE § 78-31a-126. Judgment on award -- Attorney's fees and litigation expenses.
(1) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment conforming to the award. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.
(2) A court may allow reasonable costs of the motion and subsequent judicial proceedings.
(3) On application of a prevailing party to a contested judicial proceeding under Section 78-31a-123, 78-31a-124, or 78-31a-125, the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award.

STATEMENT OF THE CASE

Nature of the case, course of proceedings, disposition in court below

An arbitrator unlawfully expelled Appellants Duke and Cardenas as members of their limited liability company, and also removed Appellant Duke as a manager of the company. Such action destroyed Appellants' property rights in membership and management of their company.

The arbitrator's action was unlawful because he "exceeded... [his]... authority" under Section 78-31a-124(1)(d) of the Utah Uniform Arbitration Act because the Utah Revised Limited Liability Company Act expressly provides that only a court, through an independent judicial determination, can expel a member or remove a manager. UTAH CODE § 48-2c-710(3)("judicial determination" required to expel a member); UTAH CODE § 48-2c-809 (only a "court" may remove a manager). The arbitrator also failed to "make a record" as required by 78-31a-120(1) of the Utah Uniform Arbitration Act.

The trial court simply rubber-stamped the arbitrator's award, without making an independent judicial determination. The trial court thereby violated both Appellants' rights to a "judicial determination," as required by Section 48-2c-710(3) of the Utah Revised Limited Liability Company Act for expelling a member, as well as Appellant Duke's right to have a "court" determine whether he should have been removed as a manager under Utah Code Section 48-2c-809.

The trial court's failure to make an independent judicial determination also violated Appellants' rights to their "day in court" under the Due Process and Open Courts provisions

of the Utah Constitution.

In addition, the trial court's summary upholding of the arbitrator's award violated Section 78-31a-120(1) of the Utah Uniform Arbitration Act because the arbitrator failed to "make a record" as required by that section. And by refusing to award Appellants their attorney fees, costs and interest, the trial court also violated Section 78-31a-126 of the Utah Uniform Arbitration Act.

This Court therefore should reverse the trial court, vacate the arbitrator's award, grant Appellants their attorney fees, costs and interest at trial and on appeal, and order the trial court to issue such other orders as will compensate Appellants for harms resulting from the arbitrator's unlawful award.

Statement of Facts

1. On July 18, 2003, Appellants and Appellees executed an "Amended and Restated Operating Agreement of Way Cool Dirt Cheap, LLC" (hereinafter "Operating Agreement"). (R. 225-43; Addendum Exh. 1)

2. The parties named their company "Way Cool Dirt Cheap, LLC" (hereinafter "WCDC"). (R. 227; Addendum Exh. 1, § 2.2, p.3)

3. The Operating Agreement provides for the following contributions and percentage ownership of the parties:

Party	Contribution	Percentage Interest
Appellant Duke	$150,000	45%
Appellant Carmen	$100	10%
Appellee RGraham	$75,000	30%
Appellee DGraham	$60,000	15%

(R. 227, 243; Addendum Exh. 1, pp. 3, 19)

4. Appellant Duke and Appellee RGraham are designated as the managers of WCDC). (R. 228; Addendum Exh. 1, §3.1(c), p.4)

5. Such managers may removed "... by Members holding two thirds of the Percentage Interests, held by Members, acting by written consent or at a meeting of the Members." (R. 229; Addendum Exh. 1, §3.3(b), p.5)

6. WCDC is designated as "... a limited liability company formed under the [Utah Revised Limited Liability Company Act]... ." (R. 225; Addendum Exh. 1, p. 1, Recital, ¶1.1(a))

7. Resolution of inconsistencies between the Operating Agreement and the Utah Revised Limited Liability Company Act is provided for as follows:

> "If there are inconsistencies between this Agreement and the Act, this Agreement will control, **except to the extent the inconsistencies relate to provisions of the Act that the Company cannot alter by agreement**."

(R. 238-39; Addendum Exh. 1, §7.3, pp. 14-15)(Emphasis added)

8. With respect to resolution of disputes by arbitration, the Operating Agreement provides:

> "The arbitration procedure shall be governed by the United States Arbitration Act, 9 U.S.C. §§1-16, and the award rendered by the arbitrator shall be final and binding on the parties and **may be entered in any court having jurisdiction thereof**."

(R. 240-41; Addendum Exh. 1, 8.3(a), pp. 16-17)(Emphasis added)

9. Enforcement of an arbitration award, however, is further provided for as follows:

> "**Any legal proceeding to enforce an arbitration award** hereunder may be brought in a court of competent jurisdiction (either state or federal) in Salt Lake County,

Utah."

(R. 241; Addendum Exh. 1, p.17, ¶8.4)(Emphasis added)

10. A dispute arose between Appellants and Appellees regarding WCDC, and by order dated February 23, 2005, the trial court ordered the parties to arbitrate their dispute. (R. 138, at 143)

11. On Thursday, August 11, 2005, Arbitrator Kent B. Scott issued an award which (a) expelled both appellants Duke and Cardenas as members of WCDC and (b) removed Appellant Duke as manager of WCDC. (R. 266, 271; Addendum Exh. 2, (Award--¶1, p.1; ¶7, p.6))

12. The arbitrator based the expulsion of Appellants as members from WCDC on Utah Code §§ 48-2c-710(3)(a) and (c). (R. 266; Addendum Exh. 2, (Award--¶1, p.1))

13. The arbitrator made no findings, but only provided "Comments" as the foundation for his award, and expressly stated that:

> "...I am providing the following comments in connection with the Award. The **comments are not to be construed or taken to be findings** of fact or conclusions of law."

(R. 268; Addendum Exh. 2, (Award-- p.3))(Emphasis added)

14. On October 14, 2005, the trial court below entered a two-page "Order Confirming Arbitration Award," summarily providing:

> "The Award issued by arbitrator Kent B. Scott on August 11, 2005 (the 'Award') is confirmed. A copy of the Award is attached as Exhibit 'A' and incorporated by this reference."

(R. 263-64; Addendum Exh. 2, (Order--¶1, pp. 1-2))

15. Also on October 14, 2005, the trial court below issued a "Judgement [sic] Conforming to Arbitration Award" summarily providing:

> "The Court granted Randal and David Graham's Motion for Order Confirming Arbitration Award and for Judgment Conforming to the Award. For the reasons set forth in the in the [sic] Award of Arbitrator Kent B. Scott dated August 11, 2005 (the 'Award'), the court enters judgment as follows:"

(R. 274; Addendum Exh. 3, p.1)

16. The trial court acknowledged that its "Judgement":

> "...**copied everything verbatim**, including nothing more, and leaving out nothing, than is set forth in the award, other than the beginning statements and the concluding signatures."

(R. 371; Addendum Exh. 4, ll.8-11, p.193)(Emphasis added)

17. The trial court emphasized that its "Judgement":

> "...[did not do] anything different from signing the confirmation order... ."

(R. 371; Addendum Exh. 4, l.4, p.194)

18. Appellant's counsel pointed out to the trial court that "the law of the state of Utah is that you cannot either expel a member or expel a manager of a limited liability company except by judicial proceedings." (R. 371; Addendum Exh. 4, ll. 14-17, p.184)

19. In response, the trial court stated that it considered the arbitrator's award to be "...a judicial determination." (R. 371; Addendum Exh. 4, ll. 14-15, p.187)

20. The trial court apparently labored under the impression that the arbitrator was free to disregard applicable law:

> "THE COURT: So your position is, even if Arbitrator Scott made a mistake as to the law, that doesn't matter.
> "MR. WILLIAMS: That's right."

(R. 371; Addendum Exh. 4, ll. 2-5, p.176)

21. In summary, the trial court concluded:

> "So, again, I would -- I would find and rule as a matter of law that -- that, in this instance, with respect to the removal of members or managers, that the arbitrator did not exceed his authority, that that was within his authority."

(R. 371; Addendum Exh. 4, ll. 17-21, p.188)

22. The trial court made it crystal-clear that it was not making an independent determination, but merely adopting the arbitrator's award:

> "I think I've arbitrated personally over the years, as an advocate, maybe 150 arbitration cases. I have served as an arbitrator also on a number of cases. And I feel that it is a -- it is a good system, but one of the reasons it's good is because the award of the arbitrator has such a potential finality. And in this instance, it's obvious that the plaintiffs don't agree with what the arbitrator did and, you know, that's their prerogative. But that doesn't mean that it shouldn't be enforced under the law."

(R. 371; Addendum Exh. 4, ll. 2-11, p.195)

SUMMARY OF ARGUMENT

An arbitrator unlawfully expelled Appellants Duke and Cardenas as members of their limited liability company, and also removed Appellant Duke as a manager of the company. Such action destroyed Appellants' property rights in membership and management of their company. The arbitrator exceeded his authority because only a court, through an independent judicial determination, can expel a member or remove a manager from a limited liability company. The arbitrator also failed to "make a record" as required by law.

The trial court summarily confirmed the arbitrator's award without conducting an independent judicial determination, and even though the arbitrator had failed to make a record. Moreover, the trial court denied Appellants their attorney fees, costs and interest.

The trial court's judgment should be reversed because the trial court thereby violated both Appellants' rights to a "judicial determination," as required by Section 48-2c-710(3) of the Utah Revised Limited Liability Company Act for expelling a member, as well as Appellant Duke's right to have a "court" determine whether he should have been removed as a manager under Utah Code Section 48-2c-809.

The trial court's failure to make an independent judicial determination also violated Appellants' rights to their "day in court" under the Due Process and Open Courts provisions of the Utah Constitution.

In addition, the trial court's summary upholding of the arbitrator's award violated Section 78-31a-120(1) of the Utah Uniform Arbitration Act because the arbitrator had failed to "make a record" as required by that section. And by refusing to award Appellants their attorney fees, costs and interest, the trial court also violated Section 78-31a-126 of the Utah Uniform Arbitration Act.

This Court therefore should reverse the trial court, vacate the arbitrator's award, grant Appellants their attorney fees, costs and interest at trial and on appeal, and order the trial court to issue such other orders as will compensate Appellants for harms resulting from the arbitrator's unlawful award.

ARGUMENT

I. The trial court violated Utah Code §§ 48-2c-710(3) and 48-2c-809 by confirming the arbitrator's award without making an independent "judicial determination"

A. A judicial determination was required in order to expel Appellants Duke and Cardenas as members of WCDC and to remove Appellant Duke as manager of WCDC

The Utah Revised Limited Liability Company Act provides in relevant part that a member of a company may be expelled:

> "(3) on application by the company or another member, **by judicial determination** that the member:
>
> (a) has engaged in wrongful conduct that adversely and materially affected the company's business;
>
> . . . . or
>
> (c) has engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member."

UTAH CODE § 48-2c-710(3) (Emphasis added).

The arbitrator purported to expel Appellants as members from WCDC based on Subsections (3)(a) and (c). (R. 266; Addendum Exh. 2, (Award--¶1, p.1)) However, Subsection (3) requires that a "judicial determination" must be made, finding one of the grounds set out in the Subsection, before a member may be expelled from a limited liability company.

The arbitrator cited no authority whatsoever for removing Appellant Duke as manager of WCDC. (R. 271; Addendum Exh. 2, (Award--¶7, p.6("...R. Gragam[sic] as the remaining manager.")) With respect to removal of managers of limited liability companies, the Utah Revised Limited Liability Company Act provides in relevant part:

"(1) The **district court** ... may remove a manager ... in a proceeding ... if the court finds that:

(a) the manager engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the company; and

(b) removal is in the best interests of the company.

(2) The **court** that removes a manager may bar the manager from reelection for a period prescribed **by the court**.

....

(5) If **the court** orders removal of a **manager or member** under this section, the clerk of the court shall deliver a certified copy of the order to the division for filing.

UTAH CODE § 48-2c-809 (Emphasis added).

The Operating Agreement of the parties herein provides that managers may removed "... by Members holding two thirds of the Percentage Interests, held by Members, acting by written consent or at a meeting of the Members." (R. 229; Addendum Exh. 1, §3.3(b), p.5) No such procedure was used here, however, to remove Appellant Duke as manager of WCDC.

Accordingly, Appellants Duke and Cardenas could only be removed as *members* of WCDC by a "judicial determination" pursuant to Utah Code Section 48-2c-710(3), and Appellant Duke could only be removed as *manager* of WCDC by a determination by a "court" pursuant to Utah Code Section 48-2c-809.

B. A "judicial determination" under the Utah Revised Limited Liability Company Act necessarily requires that a court, not an arbitrator, make the determination

The Utah Constitution provides:

"The judicial power of the state shall be vested in a supreme court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish."

UTAH CONST. art. VIII, § 1. Accordingly, a "judicial determination" or "court" action to expel a member or to remove a manager under the Utah Revised Limited Liability Company Act necessarily requires that a court, and not an arbitrator, make such determinations.

Judicial determination is also compelled by the policies underlying the Utah Revised Limited Liability Company Act. In CCD, L.C. v. Millsap, 2005 UT 42, 116 P.3d 366, this Court held that the substantive bases for expulsion of members of limited liability companies set out in the Utah Revised Limited Liability Company Act cannot be overridden by provisions to the contrary in operating agreements. Moreover, the Court held, the *judicial procedures* which that statute requires may not be overridden by operating agreements either:

> "The requirement that expulsions be made by **judicial determination** affords members ... [and managers], through the intervention of a neutral and impartial fact finder, the most reliable safeguard against inequitable treatment available in our society."

CCD, L.C. v. Millsap, supra at ¶ 26(Emphasis added). Therefore, by its plain meaning, as well as by its underlying policies, the Utah Revised Limited Liability Company Act demands a determination by a court, not by an arbitrator, before a member may be expelled or a manager may be removed. This is not surprising, since such actions utterly destroy the property interests embodied in such positions.

C. The "judicial determination" required is an *original judicial proceeding*

The Utah Revised Limited Liability Company Act's provisions for judicial determinations for expelling a member or removing a manager command an *original judicial proceeding*. The Operating Agreement here does not--and in fact could not--provide to the contrary.

(1) The Operating Agreement did not waive the right to an independent judicial determination

In their Operating Agreement, the parties agreed to arbitrate disputes "arising out of or relating to" the Agreement...or any agreement or document in connection therewith...and questions as to whether or not any dispute falls within the terms of" their arbitration agreement. (R. 240; Addendum Exh. 1, 8.3(a), p. 16) With respect to the *procedure* to be used to arbitrate their disputes, the parties further agreed:

> "The arbitration procedure shall be governed by the United States Arbitration Act, 9 U.S.C. §§1-16, and the award rendered by the arbitrator shall be final and binding on the parties and may be entered in any court having jurisdiction thereof."

(R. 240-41; Addendum Exh. 1, 8.3(a), pp. 16-17) Although the parties thus purported to make the arbitrator's award "final and binding," the parties further provided that such awards required judicial enforcement as follows:

> "Any legal proceeding to enforce an arbitration award hereunder may be brought in a court of competent jurisdiction (either state or federal) in Salt Lake County, Utah."

(R. 241; Addendum Exh. 1, p.17, ¶8.4) Accordingly, the Operating Agreement of the parties *by its terms* requires judicial action to enforce the award.

Such judicial action to enforce the award was required to be consistent with the Utah Revised Limited Liability Company Act, since the Operating Agreement further provides:

> "If there are inconsistencies between this Agreement and the Act, this Agreement will control, except to the extent the inconsistencies relate to provisions of the Act that the Company cannot alter by agreement."

(R. 238-39; Addendum Exh. 1, §7.3, pp. 14-15) As discussed above, the Utah Revised Limited Liability Company Act commands an independent judicial determination in order

to expel a member, or to remove a manager. And the CCD, L.C. v. Millsap, 2005 UT 42, ¶ 26, 116 P.3d 366 stands for the proposition that an operating agreement cannot dispense with such independent judicial proceedings.

The waiver of the right to an independent judicial determination can only be achieved through a waiver "expressed in the most unequivocal terms." Lindon City v. Engineers Const. Co., 636 P.2d 1070, 1074 (Utah 1981). The parties' Operating Agreement is in no sense such an "unequivocal" waiver. Accordingly, the parties' Operating Agreement did not preclude an independent judicial determination.

(2) Even if the Operating Agreement precluded an independent judicial determination, such provision would be unenforceable

Although the two statutes differ somewhat, under both the federal and Utah arbitration acts, an arbitrator's award may be vacated on the ground that the arbitrator "exceeded" his authority. 9 U.S.C. § 10(a)(4)("where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made"); UTAH CODE §§ 78-31a-124(1)(d)("an arbitrator exceeded the arbitrator's authority").

An arbitrator "exceeds authority" by acting in "manifest disregard of the law." Pacific Development, L.C. v. Orton, 2001 UT 36, ¶ 7, 23 P.3d 1035 (action in "manifest disregard of law" constitutes "exceeding authority"). An arbitrator acts in "manifest disregard of the law" when "the error is obvious and capable of being readily and instantly perceived by the average person qualified as an arbitrator" and "implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to

it." Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 951 (Utah 1996).

As discussed above, Utah Code Section 48-2c-710 (3), by its plain, express terms provides for expulsion of members "by judicial determination." Equally clearly, Utah Code Section 48-2c-809 provides that only a "court" may remove managers.

The "error" that the arbitrator committed here is that he took it upon himself to make decisions that the Legislature has expressly reserved for "judicial determination" by a "court". As this Court has emphasized, such provisions assure members and managers of limited liability companies "the most reliable safeguard against inequitable treatment available in our society," in order to adequately protect the substantial rights that membership and management positions in a limited liability company confer. CCD, L.C. v. Millsap, supra at ¶ 26.

Accordingly, even if the parties' Operating Agreement precluded an independent judicial determination, such provision would be unenforceable as contrary to the unequivocal commands and policies of the Utah Revised Limited Liability Company Act.

II. The trial court violated Appellants' right to a "day in court" under the Utah Constitution's Due Process and Open Courts provisions by confirming the arbitrator's award without making an independent "judicial determination"

> "That every person has a right to his day in court and an opportunity to be heard before he can be deprived of a justiciable right is too elementary for discussion...."

Gitsch v. Wight, 61 Utah 175, 178-79, 211 P. 705, 706 (1922); Alder v. Bayer Corp., AGFA Div., 2002 UT 115, ¶82, 61 P.3d 1068 ("The right of supplicants to prove that which they are able in court is a fundamental tenet of our jurisprudence.")

Utah Constitution Article I, Section 7 prohibits deprivations of property without due process and Article I, Section 11 secures the right of Utah residents to "open courts". UTAH CONST. art. I, § 7 (Due Process); UTAH CONST. art. I, § 11 (Open Courts). This Court has emphasized that these clauses together embody the guarantee to a "day in court". Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶66, 44 P.3d 663. In Miller, this Court held that a trial court's order requiring resolution of certain non-contractual claims through non-judicial appraisal, rather than through court litigation, deprived plaintiffs of their "day in court" secured by both the Due Process and Open Courts clauses of the Utah Constitution.

Similarly, on October 15, 2005, in a proceeding that lasted a mere 61 minutes, the trial court below simply rubber-stamped the arbitrator's decision. (R. 371; Addendum Exh. 4, pp.156, 195) The trial court signed off on a two-page "Order Confirming Arbitration Award" which provided simply that "The Award issued by arbitrator Kent B. Scott on August 11, 2005 (the 'Award') is confirmed. R. 263-64; Addendum Exh. 2, ¶1, pp. 1-2)

The trial court at the same proceeding also signed off on the "Judgement [sic] Conforming to Arbitration Award" submitted by Appellees, which provided merely that

> "The Court granted Randal and David Graham's Motion for Order Confirming Arbitration Award and for Judgment Conforming to the Award. For the reasons set forth in the in the [sic] Award of Arbitrator Kent B. Scott dated August 11, 2005 (the 'Award'), the court enters judgment ... ."

(R. 274; Addendum Exh. 3, p.1)

The "Judgement" simply "...copied everything verbatim, including nothing more, and leaving out nothing, than is set forth in the award, other than the beginning statements and the concluding signatures." (R. 371; Addendum Exh. 4, ll.8-11, p.193) The trial court

emphasized that its "Judgement" "...[did not do] anything different from signing the confirmation order... ." (R. 371; Addendum Exh. 4, l.4, p.194)

The trial court referred to the arbitrator's award as "...a judicial determination." (R. 371; Addendum Exh. 4, ll. 14-15, p.187) The trial court concluded by emphasizing that it was making no independent determination, but simply rubber-stamping the arbitrator's award:

> "I think I've arbitrated personally over the years, as an advocate, maybe 150 arbitration cases. I have served as an arbitrator also on a number of cases. And I feel that it is a -- it is a good system, but one of the reasons it's good is because the award of the arbitrator has such a potential finality. And in this instance, it's obvious that the plaintiffs don't agree with what the arbitrator did and, you know, that's their prerogative. But that doesn't mean that it shouldn't be enforced under the law."

(R. 371; Addendum Exh. 4, ll. 2-11, p.195)

The trial court thus failed to carry out the judicial function of hearing evidence, resolving conflicts in that evidence, and applying the law to arrive at legal conclusions. Appellants therefore were denied their "day in court" by the trial court in violation of Appellants' constitutional rights under Utah's Due Process and Open Courts Clauses.

III. The trial court erred by confirming the arbitrator's award herein, even though the arbitrator made no findings to support such award and thereby failed to "make a record" as required by Utah Code §78-31a-120

The Utah Arbitration Act provides that "An arbitrator shall make a record of an award." UTAH CODE § 78-31a-120(1). That Act further provides that an arbitrator's award must be vacated for misconduct by the arbitrator prejudicing the rights of a party or for exceeding authority. UTAH CODE §§ 78-31a-124(1)(b)(iii)(prejudice to party), 78-31a-124(1)(d)(exceeding authority).

This Court has held that "an arbitrator exceeds his or her delegated power if the arbitration award has no foundation in reason or fact and is, therefore completely irrational" or "utterly lacking in evidentiary support". Intermountain Power Agency v. Union Pacific Railroad Company, 961 P.2d 320, 323 (Utah 1998). Moreover, this Court has made it clear that if an arbitrator's award is "completely irrational," that is a separate and independent ground for concluding that the arbitrator has exceeded his authority. Pacific Development L.C. v. Orton, 2001 UT 36, ¶ 7 n.33, 23 P.3d 1035.

In this case, the arbitrator made no findings, but provided only "Comments" as the foundation for his award:

> "...I am providing the following comments in connection with the Award. The comments are not to be construed or taken to be findings of fact or conclusions of law."

(R. 268; Addendum Exh. 2, (Award--p.3)) Accordingly, the arbitrator thereby exceeded his authority, and the trial court erred by summarily confirming the arbitrator's award.

IV. The trial court erred by refusing to award Appellants their attorney fees, costs and interest

The Utah Arbitration Act provides that

> "On application of a prevailing party to a contested judicial proceeding under Section 78-31a-123 [to confirm an award], the court may add reasonable attorney's fees and other reasonable expenses of litigation incurred ... ."

UTAH CODE § 78-31a-126(3). Since the trial court erroneously confirmed the award and entered judgment thereon, the trial court erred by holding that Appellees were the prevailing party. Since this Court should reverse the trial court, Appellants thereby will be the "prevailing party" in the proceedings below. Since this issue will arise on remand, this court

should address it. Parkside Salt Lake Corp. v. Insure-Rite, Inc., 2001 UT App 347, ¶26, 37 P.3d 1202 (court has duty to pass on issues that may become material on remand). Accordingly, this Court should order the trial court to award Appellants their attorney fees, costs and interest pursuant to Utah Code Section 78-31a-126(3), including their attorney fees, costs and interest on appeal.

CONCLUSION

The trial court should be ordered to vacate the arbitrator's award and to issue such orders as will compensate Appellants for harms resulting from the arbitrator's unlawful award. The trial court also should be ordered to award Appellants their attorney fees, costs and interest as the "prevailing party" in the proceedings below as well as on this appeal. UTAH RULES APP. PROC. 34(a)(costs on appeal); Cooke v. Cooke, 2001 UT App 110, ¶14, 22 P.3d 1249 (successful appellant entitled to costs on appeal).

DATED this 13th day of February, 2006.

JOHN MARTINEZ
Attorney for Appellants

ADDENDUM

Exhibit 1: Amended and Restated Operating Agreement of Way Cool Dirt Cheap, LLC (R. 225-43)

Exhibit 2: Order Confirming Arbitration Award, October 14, 2005 (R. 263-73) (With Arbitrator's Award attached as R. 266-73)

Exhibit 3: Judgement [sic] Conforming to Arbitration Award, October 14, 2005 (R. 274-93)

Exhibit 4: Addendum Exh. 4, Transcript of trial court hearing, Friday, October 14, 2005 (R. 371)

ADDENDUM EXHIBIT 1

AMENDED AND RESTATED OPERATING AGREEMENT OF WAY COOL DIRT CHEAP, LLC

THIS AMENDED AND RESTATED OPERATING AGREEMENT (the "Agreement") is executed as of July 18th, 2003 by and between RANDAL GRAHAM ("RGraham"), TED DUKE ("Duke"), David S. Graham ("DGraham"), and MARIA DEL CARMEN ZAVALA CARDENAS ("Carmen") (collectively the "Members") and WAY COOL DIRT CHEAP, LLC, a Utah limited liability company (the "Company").

RECITAL

The Company is a limited liability company formed under the Act on April 15, 2003 with RGraham and Duke as the sole Members. These Members also adopted an Operating Agreement.

The parties intend by this Agreement to supersede, restate and confirm the rights and obligations of the Members with respect to the Company's governance and financial affairs, to adopt procedures for the conduct of the Company's activities, to admit DGraham and Carmen as additional Members and to revise the Percentage Interests of the Members.

Accordingly, with the intention of being legally bound, the parties agree as follows:

ARTICLE 1

DEFINITIONS

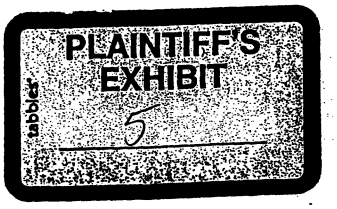
1.1 Defined Terms. For purposes of this Agreement, unless the language or context clearly indicates that a different meaning is intended, capitalized terms have the meanings specified in this Article:

(a) "Act" means the Utah Revised Limited Liability Company Act.

(b) "Agreement" means this agreement.

(c) "Articles" means the Articles of Organization, as amended to date, filed with the Utah Division of Corporations and Commercial Code to organize the Company as a limited liability company.

(d) "Available Funds" means the Company's gross cash receipts, from its operations or otherwise, less the sum of: (1) payments of principal, interest, charges and fees pertaining to the Company's indebtedness; (2) expenditures incurred incident to the conduct of the



Company's business; and (3) amounts reserved to meet the anticipated needs of the Company's business.

(e) "Capital Account" of a Member means the capital account maintained for each Member and each Transferee in accordance with Article 4.

(f) "Code" means the Internal Revenue Code of 1986, as amended.

(g) "Contribution" means anything of value that a Member contributes to the Company as a prerequisite for the acquisition of its Interest in the Company.

(h) "Distribution" means the Company's direct or indirect transfer of money or other property to a Member with respect to its Interest in the Company.

(i) "Effective Date," with respect to this Agreement, means the date set forth in the opening paragraph hereof.

(j) "Interest" or "Membership Interest" means the economic rights owned by a Member or a Transferee.

(k) "Manager" means a Person who is named or appointed to manage the Company, in accordance with Article 3.

(l) "Member" means a Person who has acquired and owns an Interest in the Company and who is admitted as a Member.

(m) "Minimum Gain" means minimum gain as defined in section 1.704 of the Regulations.

(n) "Percentage Interest" means the relative economic interest in the Company owned by a Transferee or by a Member, evidencing such owner's share of profits, gains and losses and the owner's share of the net assets of the Company that are distributable to the owner upon dissolution of the Company.

(o) "Person" means a natural person or an entity.

(p) "Regulations" means proposed, temporary or final regulations promulgated under the Code by the U.S. Treasury Department.

(q) "Terminating Event" means the death or disability of a Member (or a Transferee) who is a natural Person or the dissolution or termination of a Member that is an entity. A "Terminated Member" means a Member that is disabled, the estate of a Member that is deceased or the successor of a Member that is dissolved.

(r) "Transfer," as a noun, means a transaction or event by which ownership of an Interest is changed or encumbered, including a sale, exchange, abandonment, gift, pledge or foreclosure. "Transfer," as a verb, means to effect a Transfer.

(s) "Transferee" means a Person who acquires an Interest by a Transfer from a Member or another Transferee but who is not admitted as a Member.

ARTICLE 2

THE COMPANY

2.1 Status. The Company is a Utah limited liability company organized under the Act.

2.2 Name. The Company's name is Way Cool Dirt Cheap, LLC.

2.3 Term. The Company's existence as a limited liability company will continue until December 31, 2033, unless sooner terminated under the Act or this Agreement.

2.4 Principal Place of Business. The Company's principal place of business is located at 768 West 1425 North, Layton, Utah 84041.

2.5 Registered Agent and Registered Office. The Company's registered office in Utah is located at its principal place of business set forth in paragraph 2.4 above. Its registered agent at that location is RGraham.

ARTICLE 3

MEMBERS AND MANAGEMENT

3.1 Identification.

(a) Members and Percentage Interests. The names and Percentage Interests of the current Members are as follows:

Name	Percentage Interests
Duke	45%
RGraham	30%
DGraham	15%
Carmen	10%

(b) Contributions. The Contributions by the Members and their capital accounts are set forth on Exhibit "A" attached hereto.

(c) Managers. RGraham and Duke are the Managers of the Company.

3.2 Members Meetings and Voting.

(a) Meetings. Meetings of the Members, for any purpose or purposes, may be called by a Manager, or by Members holding one-fifth or more of all the Percentage Interests. The meeting shall be held in Salt Lake County, Utah, at such location as is set forth in the notice calling such meeting, or by conference telephone whereby each participant may be heard by each other participant, unless all Members in attendance specify a different location. The notice shall also specify the place, day and hour of the meeting and the purpose or purposes for which the meeting is called. The written notice shall be delivered not less than ten nor more than thirty days before the date of the meeting, either personally or by mail, to each Member of record, unless such notice is waived by all Members or unless all Members are present at the meeting. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail, addressed to each Member at its address as it appears on the records of the Company, with postage prepaid.

(b) Voting; Quorum.

(i) A Member may act through attendance at a meeting of Members or through a Person authorized by a signed proxy. Member(s) whose aggregate Percentage Interests exceed 75 percent (75%) of all Percentage Interests owned by Members will constitute a quorum at a meeting of Members. No action may be taken in the absence of a quorum.

(ii) Except with respect to matters for which a greater minimum vote is required by the Act or this Agreement, the vote of Members whose aggregate Percentage Interests exceeds 75 percent (75%) of all Percentage Interests owned by Members will constitute the act of the Members at a meeting of Members.

(c) Written Consent. The Members may act without a meeting by written consent describing the action proposed to be taken and signed by Members whose aggregate Percentage Interests are at least equal to the minimum that would be necessary to take the action at a meeting at which all Members were present.

3.3 Management of the Company.

(a) General. The business and affairs of the Company shall be managed by the two Managers who are identified in paragraph 3.1(c). The Managers shall make all decisions affecting the management, operation and control of the Company, except for instances in which a vote of a specified number of the Members is required hereby or by a provision of the Act.

Members holding 75 percent (75%) of the Percentage Interests owned by Members may amend this paragraph to change the number of Managers. If there should be more than two Managers, the decision of a majority of all Managers shall be the decision of the Company.

(b) Vacancies. Any vacancy occurring in the position of Manager may be filled by the Members, either at a meeting of Members at which a quorum is present, or pursuant to a written consent adopted pursuant to this Agreement. Any Manager may also be removed, with or without cause, by Members holding two thirds of the Percentage Interests, held by Members, acting by written consent or at a meeting of Members. Any Manager may resign at any time; such resignation shall be in writing and shall take effect at the time specified in the notice of resignation, or if no time is specified, at the time of its receipt by another Manager or Member.

(c) Tax Matters Partners. RGraham shall act as the initial "tax matters partner," for all tax matters in accordance with appropriate Regulations, and shall be authorized to litigate, negotiate and resolve tax matters on behalf of the Company. The tax matters partner may make any tax elections for the Company allowed under the Code, or the tax laws of any state, country, county or other jurisdiction having taxing authority over the Company. The tax matters partner shall serve as such at the discretion of the Members.

3.4 Transfers of Interest.

(a) Restrictions on Transfer. Except as otherwise provided in this Agreement, no Member may Transfer all or any part of its Interest without the prior written consent of each Manager or of Members holding 75 percent (75%) of all outstanding Percentage Interests.

(b) Profit-Loss Allocation. If any or all of a Member's Interests are Transferred, there shall be allocated to the successor, a fraction of the profits and losses for the taxable year of the Company in which such disposition occurs, the numerator of such fraction being the number of days in such year that it was the owner of such Percentage Interests or such part thereof and the denominator of such fraction being the number of days in such taxable year. Any predecessor or successor of such Member in respect of such Percentage Interests or part thereof shall share in profits and be charged with such losses for the balance of the taxable year.

(c) Involuntary Transfers. Whenever any owner of an Interest has any notice or knowledge of any attempted, pending or consummated involuntary Transfer of or lien or charge upon any Interest, whether by operation of law or otherwise, he or she shall give immediate notice of that Transfer, lien or charge, and shall disclose to the Company all pertinent information in its

possession relating to such transfer, lien or charge. The Company (or its designee) shall have the continuing option to purchase such Interest, for a period of ninety (90) days, upon five days advance written notice by the Company (or its designee) to the Member or other record holder of the Interest for the Purchase Price determined as set forth in paragraph 3.5(b), and any such purchase shall be free and clear of any and all liens, charges and encumbrances. The purchase price for any Interests acquired by the Company (or its designee) pursuant to this provision shall be paid (at the option of the purchaser) either in cash or through the delivery of a promissory note payable in 20 equal quarter-annual installments of principal and interest (at 6% per annum) from the date of purchase, with the first such installment due 180 days after such purchase.

(d) Transferee Not a Member. If a Member attempts to transfer its rights as a Member, but does not satisfy all of the provisions of this paragraph 3.4, then the Transferee shall not become a Member in the Company and will have no right to vote or otherwise participate in the business or affairs of the Company. Such Transferee shall be entitled only to receive the share of profits or other compensation to which it would have been entitled as a Member holding the economic interest that its predecessor conveyed to it.

(e) First Offer Rights. (i) If any Member (the "Selling Member") shall determine to Transfer any or all of its Membership Interest in exchange for valuable consideration, the Selling Member shall give notice thereof to each other Member stating the suggested price for the purchase, and, if there is an interested purchaser who is not a Member, the identity of such purchaser and all of the terms of such proposed purchase. Except as provided in clause (ii) of this subparagraph 3.4(e), within 45 days after receipt of such notice, the other Members may by notice to the Selling Member elect to purchase such Membership Interest for the price offered by the Selling Member, payable in accordance with the terms proposed by the Selling Member. If more than one other Member chooses to purchase the Membership Interest, they may do so pro rata in proportion to the Percentage Interests held by each such Member. The Selling Member shall notify the purchasing Members of the time and date for consummation of the purchase, which shall be not less than 7 days nor more than 60 days after giving notice of purchase to the other Members. Upon receipt of such notice by the other Members, they shall be obligated to purchase such Membership Interest and the Selling Member shall be obligated to sell the same in accordance with the terms hereof. The closing of a purchase and sale of a Membership Interest pursuant to this paragraph 3.4(e) shall

be held at the principal office of the Company, at the date and time specified in the notice of exercise.

(ii) The preceding subparagraph notwithstanding, if there should occur a Terminating Event with respect to Duke, and RGraham continues to be a Member of the Company, then RGraham shall have the right to purchase from Duke's heirs or other successors an additional Percentage Interest in the Company sufficient that RGraham will have a Percentage Interest of 51%, or Duke's entire Percentage Interest if his Percentage Interest is not large enough to reach 51% as a result of such purchase. Any balance of Duke's Percentage Interest shall be subject to the terms of clause (i) above with RGraham participating with a Percentage Interest of 51%. RGraham shall have 15 days after receipt of notice of Duke's Terminating Event to notify Duke or his successor of RGraham's exercise of his purchase rights provided in this clause (ii).

(f) Company's Purchase Rights. If the other Members fail to exercise their rights to purchase from the Selling Member within the specified period hereinabove referred to, the Company shall, for the 10-day period following the expiration period, have the option to purchase such Membership Interest on identical terms and conditions. The Company may assign this right to such Person as it chooses.

(g) Sale to Third Party. If the other Members and the Company do not complete the purchase of the entire Membership Interest offered by the Selling Member within 90 days after termination of such 10-day period, the Selling Member may sell the portion of its unsold Membership Interest to any third party, but only at the price (or the pro rata portion thereof) and upon the terms provided in such offer and provided that the purchaser agrees to be bound by the terms of this Agreement with the same force and effect as if it were an original party hereto.

3.5 Transfer on Termination.

(a) Permissible Transfers. Upon the occurrence of a Terminating Event with respect to a Member, such Member's successor may transfer the Terminated Member's Interests to another Member, to the Company or its designee, to a member of the Terminated Member's family, or to any of them, and on such terms, as the successor determines in its sole discretion.

(b) Purchase Price. The "Purchase Price" of a Member's Interest shall be determined conclusively as follows: Except for the Transfers pursuant to paragraph 3.4(e)(i) and (g) above, the Purchase Price shall be the value of the Company multiplied by the Percentage Interests owned by a Terminated Member. The value of the Company shall be established by

negotiation between the persons who have or will have an interest in the Company. Absent such an agreement, such value shall be determined by an independent certified public accounting firm mutually agreeable to all of the Members and its decision shall be binding. All periods for notices of election to purchase under this agreement shall be extended by the period of time from the date of such reference to the date of such decision by the accounting firm.

(c) On any purchase pursuant to this paragraph 3.5, payments shall be made as provided in the final sentence of paragraph 3.4(c).

3.6 Additional Members. If Members owning two-thirds of all Percentage Interests consent, the Managers may offer and sell additional Interests in the Company, either to existing Members or to persons or entities not previously affiliated with the Company. Existing Members will receive 30 days prior notice of such proposed offering and shall have the prior right to participate by purchasing some or all of such additional Interests in the proportions of their Percentage Interests. The Managers shall determine the terms and conditions of the sales of additional Interests, including the consideration to be paid to the Company. The Manager shall make appropriate adjustments in the capital accounts, Percentage Interests and other records of the Company to reflect each additional Contribution based upon the fair market values of the net assets of the Company relative to such Contributions and the prices established pursuant to paragraph 3.5(b).

3.7 Compensation to Managers. The Managers shall determine their own compensation, subject to the approval of a majority of the Members.

3.8 Liability and Indemnification.

(a) Liability. To the extent permitted by law, no Manager, and no Member, shall be liable, responsible, or accountable in damages or otherwise to the Company or to any Member for any act, omission or error in judgment performed, admitted or made in good faith and in a manner it believed to be within the scope of his authority and in the best interest of the Company; provided that such act, omission or error in judgment does not constitute fraud, gross negligence, willful misconduct or other clear breach of fiduciary duty.

(b) Indemnity. To the extent permitted by law, the Company shall indemnify and hold harmless each Manager and each Member from and against any loss, expense, damage or injury suffered, sustained or incurred arising out of any actual or threatened action, suit, proceeding or claim relating to its ownership in or activities on behalf of the Company, or in furtherance of the

success of the Company, including, but not limited to, any judgment, award, settlement, reasonable attorneys' fees, and other costs and expenses incurred in connection with the defense or settlement of any actual or threatened action, suit proceeding or claim; provided, however, that the acts, omissions, or alleged acts or omissions upon which such actual or threatened action, suit or proceeding or claim is based or admitted was undertaken in good faith in a manner believed to be advantageous to the Company and did not constitute fraud, gross negligence, willful misconduct or other clear breach of fiduciary duty.

(c) Expenses. The Company shall reimburse each Member and each Manager for all costs and out-of-pocket expenses incurred in managing, promoting and furthering the business and operations of the Company.

3.9 No Competing Activities. No Member or Manager, nor any affiliate of a Member or Manager, may participate in any business which compete directly or indirectly with the business of the Company in the Western United States for so long as it is a Member or Manager or an affiliate of a Member or Manager or for two (2) years following termination of his status as a Member of the Company, service as a Manager, or tenure as an affiliate of any Member or Manager.

3.10 Time Devoted to Company Business; Standard of Care; Other Activities. The Managers shall conduct the business in good faith and with the care that an ordinary prudent person would exercise in a like position, under similar circumstances. The Managers shall conduct the business in accordance with the best industry practices and in all material respects with the terms and provisions of all agreements and permits pertaining to the business and in compliance in all respects with applicable laws, except in each case where such non-compliance would not have a material adverse effect on the business. The Managers shall devote reasonable time to the business in order to properly manage and supervise the operations of the business, advise, consult and manage risks, and otherwise discharge the Managers' responsibilities, to the Company.

ARTICLE 4

FINANCE

4.1 Contributions.

(a) No Other Obligations. The Contribution of each Member is described in paragraph 3.1(b). No Member shall be required to contribute additional capital to the Company and no Member may contribute additional capital to the Company, without the consent of the Managers.

Each Member acknowledges that liability for the return of its Contribution is limited to the Company's assets.

(b) Additional Members. A Person admitted as a Member in connection with the acquisition of an Interest directly from the Company after the Effective Date will make the Contributions specified in the agreement pursuant to which the Person is admitted as a Member.

(c) Contributions Not Interest Bearing. A Member is not entitled to interest or other compensation with respect to any cash or property it contributes to the Company.

(d) No Return of Contribution. A Member is not entitled to the return of any Contribution prior to the Company's dissolution and winding up.

4.2 Allocation of Profit and Loss.

(a) General Tax Allocations. For federal income tax purposes, unless the Code otherwise requires, items of income or loss shall first be allocated among the Members in order to bring their Capital Account balances into the same proportions as their Percentage Interests. If one or more Capital Account balances are greater than they would have been if such balances were in the proportions of the Percentage Interests, then items of loss or deduction will be allocated to such Members to the extent necessary to eliminate this disparity. Thereafter, each item of the Company's income, gain, loss or deduction will be allocated among the Members in the proportions of their Percentage Interests.

(b) Special Allocations.

(i) If a Member unexpectedly receives an adjustment, allocation, or distribution described in sections 1.704-l(b)(2)(ii)(d)(4), (5) or (6) of the Regulations that creates or increases a deficit in the Member's Capital Account as of the end of a taxable year, a pro rata portion of each item of the Company's income, including gross income and gain for the year and, if necessary, for subsequent years will be allocated to the Member in an amount and manner sufficient to eliminate the deficit in the Member's Capital Account as quickly as possible.

(ii) If a Member would have a deficit in his or her Capital Account at the end of a year that exceeds the sum of (i) the amount the Member is required to pay the Company pursuant to an obligation described in section 1.704-l(b)(2)(ii)(c) of the Regulations, and (ii) the Member's share of Minimum Gain, a pro rata portion of each item of the Company's income, including gross income and gain, for the year will be allocated to the Member in an amount and manner sufficient to eliminate the deficit in the Member's Capital Account as quickly as possible.

(iii) If there is a net decrease in the Company's Minimum Gain during a year, the items of the Company's income, including gross income and gain, for the year and, if necessary, for subsequent years will be allocated to the Members in proportion to their shares of the net decrease in Minimum Gain. If the allocation made by this paragraph would cause a distortion in the economic arrangement among the Members and it is expected that the Company will not have sufficient income to correct that distortion, the Company may seek to have the Internal Revenue Service waive the requirement for the allocation in accordance with section 1.704-2(f)(4) of the Regulations.

(iv) Items of the Company's loss, deductions and expenditures described in Code section 705(a)(2)(B) that are attributable to nonrecourse debt and are characterized as Member nonrecourse deductions under section 1.704-2(i) of the Regulations will be allocated to the Members' Capital Accounts in accordance with section 1.704-2(i) of the Regulations.

(v) Items of income, gain, loss and deduction with respect to property contributed to the Company's capital will be allocated among the Members so as to take into account any variation between book value and basis, to the extent and in the manner prescribed by section 704(c) of the Code and related Regulations.

(vi) If the special allocations result in Capital Account balances that are different from the Capital Account balances the Members would have had if the special allocations were not required, the Company will allocate other items of income, gain, loss and deduction in any manner it considers appropriate to offset the effects of the special allocations on the Members' Capital Account balances. Any offsetting allocation required by this paragraph is subject to and must be consistent with the special allocations.

4.3 Distributions. If the Company has Available Funds, the Company may make distributions to the Members and any Transferees in the ratios equal to their Percentage Interests.

4.4 Capital.

(a) General Maintenance. The Company will establish and maintain a Capital Account for each Member in accordance with Regulation section 1.704-1(b)(2)(iv).

(b) Compliance with Code. The requirements of this paragraph are intended and will be construed to ensure that the allocations of the Company's income, gain, losses, deductions and credits have substantial economic effect under the Regulations promulgated under section 704(b) of the Code.

ARTICLE 5

RECORDS AND ACCOUNTING

5.1 Maintenance of Records.

(a) Required Records. The Company will maintain at its principal place of business such books, records and other materials as are reasonably necessary to document and account for its activities, including, without limitation, those required to be maintained by the Act.

(b) Member Access. Each Member (and its authorized representative) will have reasonable access to and may inspect and copy all books, records and other materials pertaining to the Company or its activities. The exercise of such rights will be at the requesting Member's expense.

(c) Confidentiality. No Member will disclose any information relating to the Company or its activities to any unauthorized person or use any such information for any Person's personal gain.

5.2 Financial Accounting.

(a) Accounting Method. The Company will account for its financial transactions using a method of accounting determined by the Managers in compliance with sections 446 and 448 of the Code.

(b) Taxable Year. The Company's taxable year and the Company's annual accounting period is the calendar year, unless otherwise determined by the Manager in compliance with sections 441, 444 and 706 of the Code.

5.3 Reports.

(a) Members. As soon as practicable after the close of each year, the Company will prepare and send to the Members such reports and information as are reasonably necessary to (1) inform the Members of the results of the Company's operations for the prior year and (2) enable the Members to completely and accurately reflect their distributive shares of the Company's losses, profits, gains, deductions and credits in their federal, state and local income tax returns for the appropriate year.

(b) Periodic Reports. The Company will complete and file any periodic reports required by the Act or the law of any other jurisdiction in which the Company is qualified to do business.

5.4 Tax Withholding. If the Company is required to withhold and pay over to a governmental agency any part or all of a Distribution or allocation of profit to a Member:

(i) the amount withheld will be considered a Distribution to the Member; and

(ii) if the withholding requirement pertains to a Distribution in kind or an allocation of profit, the Company will pay the amount required to be withheld to the governmental agency and promptly take such action as it considers necessary or appropriate to recover a like amount from the Member, including offset against any Distributions to which the Member would otherwise be entitled.

ARTICLE 6
DISSOLUTION

6.1 Events of Dissolution.

(a) Enumeration. The Company will dissolve upon the first to occur of:

(i) the expiration of the term set forth in paragraph 2.3;

(ii) the vote of Members holding a majority of all outstanding Percentage Interests to dissolve the Company;

(iii) any event that makes the Company ineligible to conduct its activities as a limited liability company under the Act; or

(iv) any event or circumstance that makes it unlawful or impossible for the Company to carry on its business.

(b) Exclusivity of Events. Unless specifically referred to in this paragraph, no event, including an event of dissolution prescribed by the Act, will result in the Company's dissolution.

6.2 Effect of Dissolution.

(a) Appointment of Liquidator. Upon the Company's dissolution, the Manager may appoint a liquidator, who may but need not be a Member. The liquidator will wind up and liquidate the Company in an orderly, prudent and expeditious manner in accordance with the following provisions of this paragraph 6.2.

(b) Final Accounting. The liquidator will make proper accountings (1) to the end of the month in which the event of dissolution occurred and (2) to the date on which the Company is finally and completely liquidated.

(c) Duties and Authority of Liquidator. The liquidator will make adequate provision for the discharge of all of the Company's debts, obligations and liabilities. The liquidator may sell, encumber or retain for distribution in kind any of the Company's assets. Any gain or loss recognized on the sale of assets will be allocated to the Members' Capital Accounts in accordance with the provisions of paragraph 4.2. With respect to any asset the liquidator determines to retain for distribution in kind, the liquidator will allocate to the Members' Capital Accounts the amount of gain or loss that would have been recognized had the asset been sold at its fair market value.

(d) Final Distribution. The liquidator will distribute any assets remaining after the discharge or accommodation of the Company's debts, obligations and liabilities to the Members in proportion to their Capital Accounts. The liquidator will distribute any assets distributable in kind to the Members in undivided interests as tenants in common. A Member whose Capital Account is negative will have no liability to the Company, the Company's creditors or any other Member with respect to the negative balance.

(e) Required Filings. The liquidator will file with the Utah Division of Corporations and Commercial Code such statements, certificates and other instruments, and take such other actions, as are reasonably necessary or appropriate to effectuate and confirm the cessation of the Company's existence.

ARTICLE 7

GENERAL PROVISIONS

7.1 Amendments. This Agreement may be amended only with the consent or approval of Members with Percentage Interests of at least two-thirds. No amendment may affect any Member except pro rata with all Members. The Managers are authorized and directed to execute and file any amendment to the Articles required by the Act. If any such amendment results in inconsistencies between the Articles and this Agreement, this Agreement will be considered to have been amended in the specifics necessary to eliminate the inconsistencies.

7.2 Notices. Notices contemplated by this Agreement may be sent by any commercially reasonable means, including hand delivery, first class mail, or private courier. The notice must be prepaid and addressed as set forth in the Company's records. The notice will be effective on the date of receipt or, in the case of notice sent by first class mail, the fifth day after mailing.

7.3 Resolution of Inconsistencies. If there are inconsistencies between this Agreement and the Articles, the Articles will control. If there are inconsistencies between this Agreement and

the Act, this Agreement will control, except to the extent the inconsistencies relate to provisions of the Act that the Company cannot alter by agreement. Without limiting the generality of the foregoing, unless the language or context clearly indicates a different intent, the provisions of this Agreement pertaining to the Company's governance and financial affairs and the rights of the Members upon dissolution will supersede the provisions of the Act relating to the same matters.

7.4 Additional Instruments. Each Member will execute and deliver any document or statement necessary to give effect to the terms of this Agreement or to comply with any law, rule or regulation governing the Company's formation and activities.

7.5 Computation of Time. In computing any period of time under this Agreement, the day of the act or event from which the specified period begins to run is not be included. The last day of the period is included, unless it is a Saturday, Sunday or legal holiday, in which case the period will run until the end of the next day that is not a Saturday, Sunday or legal holiday.

7.6 Entire Agreement. This Agreement and the Articles comprise the entire agreement among the parties with respect to the Company. This Agreement and the Articles supersede any prior agreements or understandings with respect to the Company. No representation, statement or condition not contained in this Agreement or the Articles has any force or effect.

7.7 Waiver. No right under this Agreement may be waived, except by an instrument in writing signed by the party sought to be charged with the waiver.

7.8 General Construction Principles. Words in any gender are deemed to include any other gender. The singular is deemed to include the plural and vice versa. Headings and underlined paragraph titles are for guidance only and have no significance in the interpretation of this Agreement.

7.9 Binding Effect. Subject to the provisions of this Agreement relating to the transferability of Stock and the rights of Transferees, this Agreement is binding on and will inure to the benefit of the Company, the Members and their respective distributees, successors and assigns.

7.10 Governing Law. Utah law governs the construction and application of the terms of this Agreement.

7.11 Counterparts. This Agreement may be executed in counterparts, each of which will be considered an original.

ARTICLE 8

DISPUTE RESOLUTION.

8.1 Negotiation. In the event that there is a dispute among the Members arising out of or relating to this Agreement or to the operation of the Company, the parties shall attempt in good faith to resolve such dispute promptly by negotiation. Any party may give each other party written notice that a dispute exists (a "Notice of Dispute"). The Notice of Dispute shall include a statement of such party's position. Within ten days of the delivery of the Notice of Dispute, the parties shall meet at a mutually acceptable time and place, and attempt to resolve the dispute. All documents and other information or data on which each party relies concerning the dispute shall be furnished or made available on reasonable terms to each other party at least five business days before the first meeting of the parties as provided by this paragraph 8.1.

8.2 Mediation. If the dispute has not been resolved by negotiation within twenty days of the delivery of a Notice of Dispute, the parties shall endeavor to settle the dispute by mediation under the then current CPR Model Mediation Procedure for Business Disputes ("CPR") or the comparable provisions of the mediation rules of the American Arbitration Association ("AAA") or the rules of any other reputable organization that sponsors mediation as the parties determine (the "Rules"). Unless otherwise agreed, the parties shall agree upon a mediator or, if they cannot agree upon a mediator within five days of commencement of the mediation procedure, then they shall select a mediator pursuant to the CPR, AAA or other organization's rules, as appropriate. Expenses of mediation shall be divided equally between the parties to the dispute.

8.3 Arbitration.

(a) In General. Assuming the inability of the Member to resolve their differences as provided in paragraphs 8.1 and 8.2, the controversy or claim arising out of or relating to this Agreement or any agreement or document in connection therewith (including any question arising under paragraph 3.5(c) and questions as to whether or not any dispute falls within the terms of this paragraph or the selection of arbitrators) shall be settled by arbitration in Salt Lake City, Utah in accordance with the Rules, by a single arbitrator mutually acceptable to the parties, as the parties shall agree, or as designated by the initiating party. Any party may initiate arbitration from and after 60 days following the delivery of a Notice of Dispute if the dispute has not then been settled by negotiation or mediation. The arbitration procedure shall be governed by the United

States Arbitration Act, 9 U.S.C. §§ 1-16, and the award rendered by the arbitrator shall be final and binding on the parties and may be entered in any court having jurisdiction thereof.

(b) Discovery. Each party shall have discovery rights as provided by the Federal Rules of Civil Procedure; provided, however, that all such discovery shall be commenced and concluded within forty-five (45) days of the initiation of arbitration.

(c) Efficient Proceedings. It is the intent of the parties that any arbitration shall be concluded as quickly as reasonably practicable. Unless the parties otherwise agree, once commenced, the hearing on the disputed matters shall be held at least four days a week until concluded, with each hearing date to begin at 9:00 a.m. and to conclude at 5:00 p.m. The arbitrator shall use all reasonable efforts to issue the final award or awards within a period of five business days after closure of the proceedings. Failure of the arbitrator to meet the time limits of this paragraph 8.3 shall not be a basis for challenging the award. The parties shall maintain as confidential the existence and result of the mediation and arbitration.

(d) Allocation of Costs. The arbitrator may instruct the non-prevailing party to pay all costs of the proceedings, including the fees and expenses of the arbitrator and the reasonable attorneys' fees and expenses of the prevailing party, but only if the prevailing party shall have complied with the provisions of paragraphs 8.1 and 8.2 above. In the absence of such instruction, the parties shall bear their own costs and share equally the fees and expenses of the arbitrator.

8.4 Ancillary Proceedings. Any legal proceeding instituted to enforce an arbitration award hereunder may be brought in a court of competent jurisdiction (either state or federal) in Salt Lake County, Utah. Each party hereby submits to personal jurisdiction there, irrevocably waives any objection as to venue, and further agrees not to plead or claim in any such court that any such proceeding has been brought in an inconvenient forum. Nothing herein shall be construed to prevent any party from seeking equitable relief in such courts or in any court of competent jurisdiction to restrain or prohibit any breach or threatened breach of any covenant of the parties set forth in this Agreement, whether or not the parties have first sought to resolve the dispute through negotiation, mediation or arbitration.

Signed on the respective dates set forth below, to be effective as of the Effective Date.

COMPANY:

WAY COOL DIRT CHEAP, LLC

Date: 7-18-03

By: _____
Manager

Date: 7/18/2003

By: _____
Manager

MEMBERS:

Date: 7/18/2003

_____
RANDAL GRAHAM

Date: 7-18-03

_____
TED DUKE

Date: 7/18/2003

_____
DAVID S. GRAHAM

Date: 09/25/03

_____
MARIA del CARMEN ZAVALA CARDENAS

EXHIBIT "A"

CAPITAL CONTRIBUTIONS

RGraham has contributed cash in the amount of Seventy Five Thousand Dollars ($75,000).

Duke has contributed the following described property with an agreed upon value of $150,000:

DGraham shall contribute cash in the amount of Sixty Thousand Dollars ($60,000).

Carmen shall contribute her promissory note for $100.00, due on August 1, 2005.

CATCH ALL PROVISIONS

Any and all other property used in connection with the operation of Way Cool Dirt Cheap.

ADDENDUM EXHIBIT 2

Russell S. Walker, #3363
David R. Williams, #6686
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265 East 100 South, Suite 300
P.O. Box 3358
Salt Lake City, Utah 84110-3358
Telephone: (801) 364-1100

Attorneys for Randal Graham
and David S. Graham

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TED DUKE, an individual; and MARIA DEL CARMEN SAVALA CARDENAS, an individual, Plaintiffs, vs. RANDAL GRAHAM, an individual; DAVID S. GRAHAM, an individual; and CRAIG R. MARIGER, in his capacity as purported arbitrator herein, Defendants.	**ORDER CONFIRMING ARBITRATION AWARD** Civil No. 040925274 Judge John Paul Kennedy

Randal Graham and David Graham moved for an order confirming an arbitration award and for a judgment conforming to the arbitration award. Pursuant to the provisions of Utah Code Ann. §78-31a- 123 and Utah Code Ann. §78-31a-126,

IT IS ORDERED:

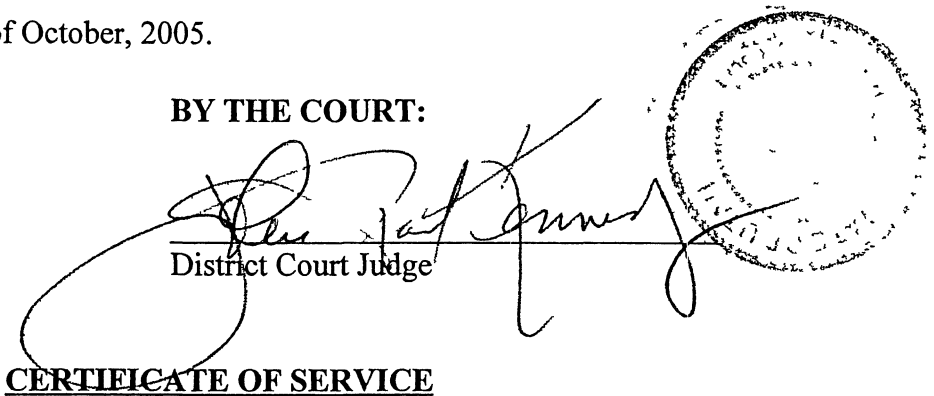
1. The Award issued by arbitrator Kent B. Scott on August 11, 2005 (the "Award")

is confirmed. A copy of the Award is attached as **Exhibit "A"** and incorporated by this reference.

2. A judgment conforming to the Award shall be entered. The judgment may be recorded, docketed and enforced as any other judgment in a civil case.

DATED this 14 day of October, 2005.

BY THE COURT:



District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 2005, I faxed and mailed by U.S. First Class Mail, a true and correct copy of the foregoing ORDER CONFIRMING ARBITRATION AWARD, postage prepaid to the following:

Nick J. Colessides
466 South 400 East, Suite 100
SLC, UT 84111-3325
Facsimile: (801) 521-4452

EXHIBIT "A"

THE ARBITRATION OF GRAHAM VS. DUKE

In the Matter of the Arbitration between: RANDALL FRAHAM & DAVID GRAHAM Claimants, vs. TED DUKE & MARIA DEL CARMEN ZAVALA CARDENAS Respondents.	AWARD Case No. 04092574 Arbitrator: Kent B. Scott

INTRODUCTION

THE UNDERSIGNED ARBITRATOR, having been duly appointed by the parties in accordance with the terms of the Amended and Restated Operating Agreement of Way Cool Dirt Cheap dated July 18, 2003 ("Operating Agreement"), and the arbitration of this case having been ordered by the Hon. Bruce C. Lubeck, District Court Judge under his Order of February 23, 2005, and the Arbitrator having conducted an evidentiary hearing on June 13 & 14 and July 21, 22, 23, 24, 2005, and having further conducted oral arguments on July 29, 2005, in Salt Lake City, Utah, in which the parties and counsel were all present, now enters the following:

AWARD

1. Ted Duke ("Duke") and Maria Del Carmen Zavala Cardenas ("Zavala") are expelled as members of the Way Cool Dirt Cheap LLC ("WCDC') by virtue of section 48-2c-710 (3) (a) and (c) UCA.
2. Duke and Zavala are to become assignees as defined in section 48-2c-708 UCA with the rights and privileges as defined in section 48-2c-1102 UCA.
3. Randall Graham ("R. Graham") and David Graham ("D. Graham") have failed to sustain their burden of proof in showing that Duke and Zavala converted for their

personal use and benefit the profits from the St. George store and are therefore entitled to no amount for this claim.

4. R. Graham and D. Graham's claims for the $7,019 and the $12,095 as well as other claims for converted cash are denied as the weight of the evidence showed that Duke and Zavala used these monies for WCDC and OWCDC operations and inventory and not for their own personal use.

5. Duke and Zavala converted the inventory, accounts, equipment, name, good will, the St. George store leasehold interest, trade fixtures and other assets of WCDC when they created Original Way Cool Dirt Cheap ("OWCDC") and used those assets in the OWCDC operations. Duke and Zavala are ordered to return the same to WCDC forthwith as of the date of this award.

6. Duke and Zavala, by creating and operating OWCDC are in violation of paragraph 3.9 of the Operating Agreement. The terms of paragraph 3.9 of the Operating Agreement are modified to reduce the geographical area of non-competition from that of the Western United States to Utah. Duke and Zavala are restrained and prohibited from competing with WCDC in the State of Utah for a period of two years from the date of this Award as provided for in paragraph 3.9 of the Operating Agreement.

7. Duke's and Zavala's claims to dissolve and distribute the assets of WCDC and OWCDC assets are denied.

8. *R. Graham and D. Graham are the prevailing parties in this action concerning their* claims for Breach of the Operating Agreement, Conversion, Breach of Fiduciary Duty and Expulsion. They did not prevail on their claim for damages for accounting and conversion of profits derived from the St. George store operating as either WCDC or OWCDC. They are awarded their attorneys fees in the amount of $31,830 which amount represents one half of the fees incurred with Woodbury & Kesler. The fees of

$8,000 for Paul Moxley and Kathryn Brabson and $900 for the firm of Barney & McKennna are fees that are, according to the Affidavit of Lily Graham, related to the negotiation and mediation of the dispute and do not otherwise fall under paragraph 8.3 (d) of the Operating Agreement as attorneys fees incurred in connection with this arbitration.

9. Each of the parties are to bear their own costs including the arbitrator fees paid by each to all arbitrators that have served in this matter.

ARBITRATOR'S WRITTEN COMMENTS

At the request of the parties, I am providing the following comments in connection with the Award. The comments are not to be construed or taken to be findings of fact or conclusions of law. They are provided to assist the parties and their counsel to understand the reasons that form the basis for the Award.

1. The parties entered into The Amended and Restated Operating Agreement of Way Cool Dirt Cheap, LLC dated July 18, 2003 ("Operating Agreement") _ Exhibit C-5. This Operating Agreement amended all previous negotiations and the previous Operating Agreement dated February 28, 2003 ("First Operating Agreement") – Exhibit C-4.
2. Under the terms of the Operating Agreement R. Graham was to invest and did pay the amount of $75,000. He was not required to invest an additional $15,000.
3. The Operating Agreement (Exhibit C-5) and the Utah Revised Limited Liability Act (section 48-2c-101 et seq. UCA) provide to rules and procedures for operating an LLC. When disputes arise among the members, managers or both, there are provisions that govern the resolution of those disputes. Rather than follow the rules and procedures for resolving disputes under the Operating Agreement (paragraph 8) or the Revise Utah LLC Act, Duke and Zavala engaged in a course of conduct of self

help and self dealing that justifies their expulsion from the WCDC. To permit this course of conduct would encourage a departure from the rule of law and would render contract terms and the Utah Revised Limited Liability Company Act meaningless. Among those reasons that form the basis for the expulsion of Duke and Zavala are:

a. Failure to communicate with R. Graham and D. Graham or their designated representatives after October, 2003.

b. Abusive threats and ultimatums from Duke to R. Graham.

c. Summarily dismissing the Staff of the St. George store and locking out R. Graham and D. Graham.

d. Diverting two truckloads of inventory paid with funds loaned by R. Graham which were destined for the Draper store and causing them to be delivered to the St. George store.

e. Failure to account for inventory or the proceeds derived from the sale of the St. George Store after January, 2004.

f. Creating a new LLC (OWCDC) with a new tax number, bank account and converting the assets of WCDC for its operations and benefit.

g. Creating a competing business using the name, good will, lease, inventory, equipment, trade fixtures, and connections with the Mexico operations to compete with WCDC.

h. Failure to account for the revenues and costs of operation of the St. George Store of WCDC or OWCDC.

i. Failure to take meaningful steps to participate in good faith in the dispute resolution procedures set out in paragraph 8 of the Operating Agreement.

In stead of so participating. Duke and Zavala created the OCWDC entity and converted the assets of WCDC to in order to operate OWCDC.

4. The aforementioned actions and omissions constitute a breach of fiduciary duty under paragraph 3.8 of the Operating Agreement and also creates a violation of section 48-2c-710 (3) (a) and (c) UCA wherein said activities have "adversely and materially affected the company's business" and "makes it not reasonably practicable to carry on the business with the member."

5. Duke and Zavala have provided evidence of R. Graham's misconduct which in the view of the arbitrator does not constitute a violation of paragraph 3.8 of the Operating Agreement or section 48-2c-710 (3) (a) and (c). There was no requirement under the Operating Agreement for R. Graham to invest an additional $15,000. Duke and Zavala cite dissatisfaction with R. Graham in the way he handled the selection of the Draper Store site and the construction of the tenant improvements. Duke and Zavala also had differences of opinion with R. Graham concerning the need for cash with which to purchase inventory. R. Graham was not required to loan or invest additional cash into the business although the evidence establishes that substantial loans and advances were provided due to the lack of cash flow caused by the slow construction and inability to immediately money earmarked for tenant improvements to purchase inventory. Duke and Zavala also complain about the competence of R. Graham and people he hired to set up and operate both the Draper and St George Stores. The arbitrator finds that R. Graham may have committed errors in judgment in connection with these matters, but always acted in good faith and in a manner he "believed to be within the scope of his authority and in the best interest of the Company..." (See paragraph 3.8 of the Operating Agreement).

6. With the expulsion of Duke and Zavala form WCDC it is the intent of the arbitrator to designate them as assignees as provided for in section 48-2c-708 UCA with the rights and privileges as defined in section 48-2c-1102 UCA.
7. Also, with the expulsion of Duke and Zavala, all assets of WCDC and OWCDC are to be placed in control of R Graham and D. Graham, the two remaining members and R. Gragam as the remaining manager. These assets are to include but not be limited to accounts, inventory, equipment, furniture, leaseholds, trade fixtures, the name, and good will as of the date of this award.
8. Paragraph 3.9 is the non-compete clause in the Operating Agreement. It is too broad in its application as to the Western United States. WCD maintains stores in Utah only and the non-compete clause is hereby restricted to the geographical boundaries of Utah. All of the other terms of the non-compete clause are to remain in full force.
9. Concerning R.Graham's and D. Graham's claims against Duke and Zavala for failure to account for lost profits: Although there is evidence that the St. George store has realized profits (Exhibits C-10 and C-11) there is no evidence as to what happened to those profits. There was no evidence showing that monies were diverted to accounts other than the WCDC or OWCDC accounts. There was no evidence that Duke or Zavala took monies from the sale of WCDC or OWCDC inventory and used them for their personal or separate business purposed. For example, the ATM withdrawals and checks in summarized in Exhibit 2 pp.10-11 were used to pay the costs of operating the business and the $7,019 withdrawn from the WCDC account in placed in Duke's personal account was used to purchase inventory for either WCDC or OWCDC. The testimony of Lily Graham, Craig Ainge and Jamie Clawson did not reveal any improprieties. There was a lot of disagreement over what store had what level of inventory, but never a showing that inventory, revenues or profits had been

taken or converted by Duke or Zavala. Also, Craig Ainge testified of discrepancies between sales and deposits but could not make a connection or establish that Duke or Zavala converted the differences in amounts to their personal use. The burden of proof as to the lost profits claims is on the Claimants who, in the opinion of the arbitrator, did not meet their burden with the accounting testimony furnished by Craig Ainge, Jamie Clawson or Lily Graham. .

10. In addition to the initial investment of $75,000 by R. Graham and $60,000 by D. Graham (the only cash invested in WCDC) R. Graham provided for additional capital and security at his personal expense which was used to purchase inventory and pay the operating expenses of WCDC. Among the financial contributions R. Graham provided the following:

    a. Guaranty of the five year Draper lease at a cost of approximately $14,000 per month – which obligation included the balance of the tenant improvement money ($102,000) that was used to pay for company expenses and inventory.
    b. $47,000 personal loan December 3, 2003 used for inventory, shipping and general company expenses.
    c. Line of credit for $100,000 established in May, 2004 secured by a lien on the R. Graham home.
    d. $75,000 Joe Groot loan
    e. $75,000 Leo Pavich loan
    f. $50,000 family loan to R. Graham used for company expenses
    g. $10,000 Washington Mutual loan used for company expenses
    h. undetermined – personal and RDG credit cards

11. In addition to the capital R. Graham infused into WCDC he accrued salary of $60,098 and his wife, Lily, accrued salary of $18,000. D. Graham accrued salary of $36,000.

CONCLUSION

The arbitrator confirms that this Award is a complete disposition of all the issues submitted to him under the terms of the Amended and Restated Operating Agreement of Way Cool Dirt Cheap dated July 18, 2003 ("Operating Agreement"), and the Order of Hon. Bruce C. Lubeck, District Court Judge, of February 23, 2005, evidence and legal arguments on which issues was presented at the hearings held in Salt Lake City, Utah on June 13 & 14, 2005; July 21, 22, 23, 24, 2005; and July 29, 2005.

DATED 8/11/05

Kent B. Scott, Arbitrator

ADDENDUM EXHIBIT 3

Russell S. Walker, #3363
David R. Williams, #6686
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P.O. Box 3358
Salt Lake City, Utah 84110-3358
Telephone: (801) 364-1100

Attorneys for Randal Graham
and David S. Graham

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TED DUKE, an individual; and MARIA DEL CARMEN SAVALA CARDENAS, an individual, Plaintiffs, vs. RANDAL GRAHAM, an individual; DAVID S. GRAHAM, an individual; and CRAIG R. MARIGER, in his capacity as purported arbitrator herein, Defendants.	**JUDGEMENT CONFORMING TO ARBITRATION AWARD** Civil No. 040925274 Judge John Paul Kennedy ENTERED IN REGISTRY OF JUDGMENTS DATE 11/2/05

The Court granted Randal and David Graham's Motion for Order Confirming Arbitration Award and for Judgment Conforming to the Award. For the reasons set forth in the in the Award of Arbitrator Kent B. Scott dated August 11, 2005 (the "Award"), the court enters judgment as follows:

INTRODUCTION

[KENT B. SCOTT], having been duly appointed by the parties in accordance with the terms of the Amended and Restated Operating Agreement of Way Cool Dirt Cheap dated July 18, 2003 ("Operating Agreement"), and the arbitration of this case having been ordered by the Hon. Bruce C. Lubeck, District Court Judge under his Order of February 23, 2005, and the Arbitrator having conducted and evidentiary hearing on June 23 & 24 and Juy 21, 22, 23, 24, 2005, and having further conducted oral arguments on July 29, 2005, in Salt Lake City, Utah, in which the parties and counsel were all present, now enters the following:

AWARD

1. Ted Duke ("Duke) and Maria Del Carmen Zavala Cardenas ("Zavala") are expelled as members of the Way Cool Dirt Cheap LLC ("WCDC") by virtue of section 48-2c-710(3)(a) and (c) UCA.
2. Duke and Zavala are to become assignees as defined in section 48-2c-708 UCA with the rights and privileges as defined in 48-2c-1102 UCA.
3. Randall Graham ("R.Graham") and David Graham ("D.Graham") have failed to sustain their burden of proof in showing that Duke and Zavala converted for their personal use and benefit the profits fro the St. George store and are therefore entitled to no amount for this claim.
4. R. Graham and D. Graham's claims for the $7019 and the $12,095 as well as

other claims for converted cash are denied as the weight of the evidence showed that Duke and Zavala used these monies for WCDC and OWCDC operations and inventory and not for their personal use.

5. Duke and Zavala converted the inventory, accounts, equipment, name, good will, the St. George leasehold interest, trade fixtures and other assets of WCDC when they created Original Way Cool Dirt Cheap ("OWCDC") and used those assets in the OWCDC operations. Duke and Zavala are ordered to return the same to WCDC forthwith as of the date of this award.

6. Duke and Zavala, by creating and operating OWCDC are in violation of paragraph 3.9 of the Operating Agreement. The terms of paragraph 3.9 of the Operating Agreement are modified to reduce the geographical area of non-competition from that of the Western United States to Utah. Duke and Zavala are restrained and prohibited from competing with WCDC in the State of Utah for a period of two years from the date of this Award as provided for in paragraph 3.9 of the Operating Agreement.

7. Duke's and Zavala'as claims to dissolve and distribute the assets of WCDC and OWCDC assets are denied.

8. R. Graham and D. Graham are the prevailing parties in this action concerning their claims for Breach of the Operating Agreement, Conversion, Breach of

Fiduciary Duty and Expulsion. They did not prevail on their claim for damages for accounting and conversion of profits derived from the St. George store operating either as WCDC or OWCDC. They are awarded their attorneys fees in the amount of $32,830 which amount represents on half of the fees incurred with Woodbury & Kesler. The fees of $8,000 for Paul Moxley and Kathryn Branbson and $900 for the firm of Barney & Mckenna are fees that are, according to the Affidavit of Lily Graham, related to the negotiation and mediation of the dispute and do not otherwise fall under paragraph 8.3(d) of the Operating Agreement as attorney fees incurred in connection with this arbitration.

9. Each of the parties are to bear their own costs including the arbitrator fees paid by each to all arbitrators that have served in this matter.

ARBITRATOR'S WRITTEN COMMENTS

At the request of the parties, [the Arbitrator is] providing the following comments in connection with the Award. The comments are not to be construed or taken to be findings of fact or conclusions of law. They are provided to assist the parties and their counsel to understand the reasons that form the basis for the Award.

1. The parties entered into The Amended and Restated Operating Agreement of Way Cool Dirt Cheap, LLC dated July 18, 2003 ("Operating Agreement")-Exhibit C-5. This Operating Agreement amended all previous negotiations and the previous

Operating Agreement dated February 28, 2003 ("First Operating Agreement")-Exhibit C-4.

2. Under the terms of the Operating Agreement R. Graham was to invest and did pay the amount $75,000. He was not required to invest an additional $15,000.

3. The Operating Agreement (Exhibit C-5) and the Utah Revised Limited Liability Act (section 48-2c-101 *et seq.* UCA) provide rules and procedures for operating an LLC. When disputes arise among the members, managers or both, there are provisions that govern the resolution of those disputes. Rather than follow the rules and procedures for resolving disputes under the Operating Agreement (paragraph 8) or the Revised Utah LLC Act, Duke and Zavala engaged in a course of conduct of self help and self dealing that justifies their expulsion from the WCDC. To permit this course of conduct would encourage a departure from the rule of law and would render contract terms and the Utah Revised Limited Liability Company Act meaningless. Among those reasons that form the basis for the expulsion of Duke and Zavala are:

   a. Failure to communicate with R. Graham and D. Graham or their designated representatives after October, 2003.

   b. Abusive threats and ultimatums from Duke to R. Graham.

   c. Summarily dismissing the Staff of the St. George store and locking out R.

Graham and D. Graham.

d. Diverting two truckloads of inventory paid with funds loaned by R. Graham which were destined for the Draper store and causing them to be delivered to the St. George store.

e. Failure to account for inventory or the proceeds derived from the sale of the St. George store after January, 2004.

f. Creating a new LLC (OWCDC) with a new tax number, bank account and converting assets of WCDC for its operations and benefit.

g. Creating a competing business using the name, good will, lease, inventory, equipment, trade fixtures, and connections with the Mexico operations to compete with WCDC.

h. Failure to account for the revenues and costs of operation of the St. George Store of WCDC or OWCDC.

i. Failure to take meaningful steps to participate in good faith in the dipute resolution procedures set out in paragraph 8 of the Operating Agreement. Instead of so participating, Duke and Zavala created the OWCDC entity and converted the assets of WCDC to in order to operate OWCDC.

4. The aforementioned actions and omissions constitute a breach of fiduciary duty under paragraph 3.8 of the Operating Agreement and also creates a violation of

section 48-2c-710 (3) (a) and (c) UCA wherein said activities have "adversely and materially affected the company's business" and "makes it not reasonably practicable to carry on the business with the member."

5. Duke and Zavala have provided evidence of R. Graham's misconduct which in the view of the arbitrator does not constitute a violation of paragraph 3.8 of the Operating Agreement or section 48-2c-710 (3) (a) and (c). There was no requirement under he Operating Agreement for R. Graham to invest an additional $15,000. Duke and Zavala cite dissatisfaction with R. Graham in the way he handled the selection of the Draper Store site and the construction of the tenant improvements. Duke and Zavala also had differences of opinion with R. Graham concerning the need for cash with which to purchase inventory. R. Graham was not required to loan or invest additional cash into the business although the evidence establishes that substantial loans and advances were provided due to the lack of cash flow caused by the slow construction and inability to immediately money earmarked for tenant improvements to purchase inventory. Duke and Zavala also complain about the competence of R. Graham and people he hired to set up and operate both the Draper and St. George Stores. The arbitrator finds the R. Graham may have committed errors in judgement in connection with these matters, but always acted in good faith and in a manner he "believed to be within

the scope of his authority and in the best interest of the Company. . ." (See paragraph 3.8 of the Operating Agreement).

6. With the expulsion of Duke and Zavala form WCDC it is the intent of the arbitrator to designate them as assignees as provided for in section 48-2c-708 UCA with the rights and privileges as defined in section 48-2c-1102 UCA.

7. Also, with the expulsion of Duke and Zavala, all assets of WCDC and OWCDC are to be placed in control of R. Graham and D. Graham, the two remaining members and R. Graham as the remaining manager. These assets are to include but not to be limited to accounts, inventory, equipment, furniture, leaseholds, trade fixtures, the name, and good will as of the date of this award.

8. Paragraph 3.9 is the non-compete clause in the Operating Agreement. It is too broad in its application as to the Wester United States. WCDC maintains stores in Utah only and the non-compete clause is hereby restricted to the geographical boundaries of Utah. All of the other terms of the non-compete clause are to remain in full force.

9. Concerning R. Graham's and D. Graham's claims against Duke and Zavala for failure to account for lost profits: Although there is evidence that the St. George store has realized profits (Exhibits C-10 and C-11) there is no evidence as to what happened to those profits. There was no evidence showing that monies were

diverted to accounts other than the WCDC or OWCDC accounts. There was no evidence that Duke or Zavala took monies from the sale of WCDC or OWCDC inventory and used them for their personal or separate business purposed. For example, the ATM withdrawals and checks in summarized in Exhibit 2 pp.10-11 were used to pay the costs of operating the business and the $7,019 withdrawn from the WCDC account in placed in Duke's personal account was used to purchase inventory for either WCDC or OWCDC. The testimony of Lily Graham, Craig Ainge and Jamie Clawson did not reveal any improprieties. There was a lot of disagreement over what store had what level of inventory, but never a showing that inventory, revenues or profits had been taken or converted by Duke or Zavala. Also, Craig Ainge testified of discrepancies between sales and deposits but could not make a connection or establish that Duke or Zavala converted the differences in amounts to their personal use. The burden of proof as to the lost profits claims is on the Claimants who, in the opinion of the arbitrator, did not meet their burden with the accounting testimony furnished by Craig Ainge, Jamie Clawson or Lily Graham.

10. In addition to the initial investment of $75,000 by R. Graham and $60,000 by D. Graham (the only cash invested in WCDC) R. Graham provided for additional capital and security at his personal expense which was used to purchase inventory

and pay the operating expenses of WCDC. Among the financial contributions R. Graham provided the following:

a. Guaranty of the five year Draper lease at a cost of approximately $14,000 per month - which obligation included the balance of the tenant improvement money ($102,000) that was used to pay for company expenses and inventory.

b. $47,000 personal loan December 3, 2003 used for inventory, shipping and general company expenses.

c. Line of credit for $100,000 established in May, 2004 secured by a lien of the R. Graham home.

d. $75,000 Joe Groot loan.

e. $75,000 Leo Pavich loan.

f. $50,000 family loan to R. Graham used for company expenses.

g. $10,000 Washington Mutual loan used for company expenses.

h. undetermined - personal and RDG credit cards.

11. In addition to the capital R. Graham infused into WCDC he accrued salary of $60,098 and his wife, Lily, accrued salary of $18,000. D. Graham accrued salary of $36,000.

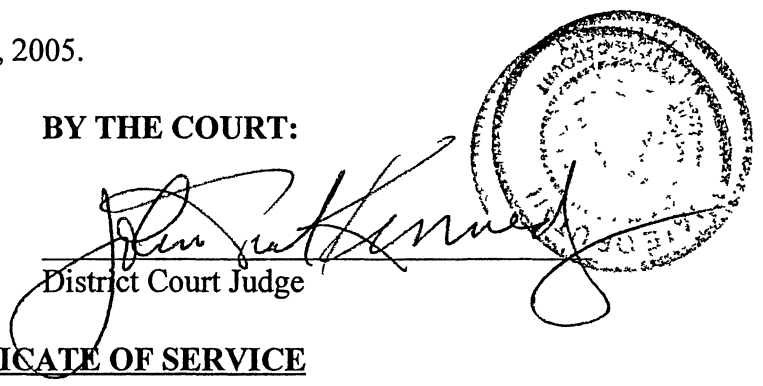
CONCLUSION

The arbitrator confirms that this Award is a complete disposition of all the issues submitted to him under the terms of the Amended and Restated Operating Agreement of Way Cool Dirt Cheap dated July 18, 2003 ("Operating Agreement"), and the Order of Hon. Bruce C. Lubeck, District Court Judge, of February 23, 2005, evidence and legal arguments on which issues was presented at the hearing held in Salt Lake City, Utah on June 13 & 14, 2005; July 21, 22, 23, 24, 2005; and July 29, 2005.

A copy of the Award is attached as **Exhibit "A"** and incorporated by this reference.

DATED this 14 day of October, 2005.

BY THE COURT:



District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 2005, I faxed and mailed by U.S. First Class Mail, a true and correct copy of the foregoing JUDGEMENT CONFORMING TO ARBITRATION AWARD, postage prepaid to the following:

Nick J. Colessides
466 South 400 East, Suite 100
SLC, UT 84111-3325
Facsimile: (801) 521-4452

EXHIBIT "A"

THE ARBITRATION OF GRAHAM VS. DUKE

In the Matter of the Arbitration between: RANDALL FRAHAM & DAVID GRAHAM Claimants, vs. TED DUKE & MARIA DEL CARMEN ZAVALA CARDENAS Respondents.	AWARD Case No. 04092574 Arbitrator: Kent B. Scott

INTRODUCTION

THE UNDERSIGNED ARBITRATOR, having been duly appointed by the parties in accordance with the terms of the Amended and Restated Operating Agreement of Way Cool Dirt Cheap dated July 18, 2003 ("Operating Agreement"), and the arbitration of this case having been ordered by the Hon. Bruce C. Lubeck, District Court Judge under his Order of February 23, 2005, and the Arbitrator having conducted an evidentiary hearing on June 13 & 14 and July 21, 22, 23, 24, 2005, and having further conducted oral arguments on July 29, 2005, in Salt Lake City, Utah, in which the parties and counsel were all present, now enters the following:

AWARD

1. Ted Duke ("Duke") and Maria Del Carmen Zavala Cardenas ("Zavala") are expelled as members of the Way Cool Dirt Cheap LLC ("WCDC') by virtue of section 48-2c-710 (3) (a) and (c) UCA.
2. Duke and Zavala are to become assignees as defined in section 48-2c-708 UCA with the rights and privileges as defined in section 48-2c-1102 UCA.
3. Randall Graham ("R. Graham") and David Graham ("D. Graham") have failed to sustain their burden of proof in showing that Duke and Zavala converted for their

personal use and benefit the profits from the St. George store and are therefore entitled to no amount for this claim.

4. R. Graham and D. Graham's claims for the $7,019 and the $12,095 as well as other claims for converted cash are denied as the weight of the evidence showed that Duke and Zavala used these monies for WCDC and OWCDC operations and inventory and not for their own personal use.

5. Duke and Zavala converted the inventory, accounts, equipment, name, good will, the St. George store leasehold interest, trade fixtures and other assets of WCDC when they created Original Way Cool Dirt Cheap ("OWCDC") and used those assets in the OWCDC operations. Duke and Zavala are ordered to return the same to WCDC forthwith as of the date of this award.

6. Duke and Zavala, by creating and operating OWCDC are in violation of paragraph 3.9 of the Operating Agreement. The terms of paragraph 3.9 of the Operating Agreement are modified to reduce the geographical area of non-competition from that of the Western United States to Utah. Duke and Zavala are restrained and prohibited from competing with WCDC in the State of Utah for a period of two years from the date of this Award as provided for in paragraph 3.9 of the Operating Agreement.

7. Duke's and Zavala's claims to dissolve and distribute the assets of WCDC and OWCDC assets are denied.

8. R. Graham and D. Graham are the prevailing parties in this action concerning their claims for Breach of the Operating Agreement, Conversion, Breach of Fiduciary Duty and Expulsion. They did not prevail on their claim for damages for accounting and conversion of profits derived from the St. George store operating as either WCDC or OWCDC. They are awarded their attorneys fees in the amount of $31,830 which amount represents one half of the fees incurred with Woodbury & Kesler. The fees of

$8,000 for Paul Moxley and Kathryn Brabson and $900 for the firm of Barney & McKennna are fees that are, according to the Affidavit of Lily Graham, related to the negotiation and mediation of the dispute and do not otherwise fall under paragraph 8.3 (d) of the Operating Agreement as attorneys fees incurred in connection with this arbitration.

9. Each of the parties are to bear their own costs including the arbitrator fees paid by each to all arbitrators that have served in this matter.

ARBITRATOR'S WRITTEN COMMENTS

At the request of the parties, I am providing the following comments in connection with the Award. The comments are not to be construed or taken to be findings of fact or conclusions of law. They are provided to assist the parties and their counsel to understand the reasons that form the basis for the Award.

1. The parties entered into The Amended and Restated Operating Agreement of Way Cool Dirt Cheap, LLC dated July 18, 2003 ("Operating Agreement") _ Exhibit C-5. This Operating Agreement amended all previous negotiations and the previous Operating Agreement dated February 28, 2003 ("First Operating Agreement") – Exhibit C-4.
2. Under the terms of the Operating Agreement R. Graham was to invest and did pay the amount of $75,000. He was not required to invest an additional $15,000.
3. The Operating Agreement (Exhibit C-5) and the Utah Revised Limited Liability Act (section 48-2c-101 et seq. UCA) provide to rules and procedures for operating an LLC. When disputes arise among the members, managers or both, there are provisions that govern the resolution of those disputes. Rather than follow the rules and procedures for resolving disputes under the Operating Agreement (paragraph 8) or the Revise Utah LLC Act, Duke and Zavala engaged in a course of conduct of self

help and self dealing that justifies their expulsion from the WCDC. To permit this course of conduct would encourage a departure from the rule of law and would render contract terms and the Utah Revised Limited Liability Company Act meaningless. Among those reasons that form the basis for the expulsion of Duke and Zavala are:

a. Failure to communicate with R. Graham and D. Graham or their designated representatives after October, 2003.

b. Abusive threats and ultimatums from Duke to R. Graham.

c. Summarily dismissing the Staff of the St. George store and locking out R. Graham and D. Graham.

d. Diverting two truckloads of inventory paid with funds loaned by R. Graham which were destined for the Draper store and causing them to be delivered to the St. George store.

e. Failure to account for inventory or the proceeds derived from the sale of the St. George Store after January, 2004.

f. Creating a new LLC (OWCDC) with a new tax number, bank account and converting the assets of WCDC for its operations and benefit.

g. Creating a competing business using the name, good will, lease, inventory, equipment, trade fixtures, and connections with the Mexico operations to compete with WCDC.

h. Failure to account for the revenues and costs of operation of the St. George Store of WCDC or OWCDC.

i. Failure to take meaningful steps to participate in good faith in the dispute resolution procedures set out in paragraph 8 of the Operating Agreement.

In stead of so participating. Duke and Zavala created the OCWDC entity and converted the assets of WCDC to in order to operate OWCDC.

4. The aforementioned actions and omissions constitute a breach of fiduciary duty under paragraph 3.8 of the Operating Agreement and also creates a violation of section 48-2c-710 (3) (a) and (c) UCA wherein said activities have "adversely and materially affected the company's business" and "makes it not reasonably practicable to carry on the business with the member."

5. Duke and Zavala have provided evidence of R. Graham's misconduct which in the view of the arbitrator does not constitute a violation of paragraph 3.8 of the Operating Agreement or section 48-2c-710 (3) (a) and (c). There was no requirement under the Operating Agreement for R. Graham to invest an additional $15,000. Duke and Zavala cite dissatisfaction with R. Graham in the way he handled the selection of the Draper Store site and the construction of the tenant improvements. Duke and Zavala also had differences of opinion with R. Graham concerning the need for cash with which to purchase inventory. R. Graham was not required to loan or invest additional cash into the business although the evidence establishes that substantial loans and advances were provided due to the lack of cash flow caused by the slow construction and inability to immediately money earmarked for tenant improvements to purchase inventory. Duke and Zavala also complain about the competence of R. Graham and people he hired to set up and operate both the Draper and St George Stores. The arbitrator finds that R. Graham may have committed errors in judgment in connection with these matters, but always acted in good faith and in a manner he "believed to be within the scope of his authority and in the best interest of the Company..." (See paragraph 3.8 of the Operating Agreement).

6. With the expulsion of Duke and Zavala form WCDC it is the intent of the arbitrator to designate them as assignees as provided for in section 48-2c-708 UCA with the rights and privileges as defined in section 48-2c-1102 UCA.
7. Also, with the expulsion of Duke and Zavala, all assets of WCDC and OWCDC are to be placed in control of R Graham and D. Graham, the two remaining members and R. Gragam as the remaining manager. These assets are to include but not be limited to accounts, inventory, equipment, furniture, leaseholds, trade fixtures, the name, and good will as of the date of this award.
8. Paragraph 3.9 is the non-compete clause in the Operating Agreement. It is too broad in its application as to the Western United States. WCD maintains stores in Utah only and the non-compete clause is hereby restricted to the geographical boundaries of Utah. All of the other terms of the non-compete clause are to remain in full force.
9. Concerning R.Graham's and D. Graham's claims against Duke and Zavala for failure to account for lost profits: Although there is evidence that the St. George store has realized profits (Exhibits C-10 and C-11) there is no evidence as to what happened to those profits. There was no evidence showing that monies were diverted to accounts other than the WCDC or OWCDC accounts. There was no evidence that Duke or Zavala took monies from the sale of WCDC or OWCDC inventory and used them for their personal or separate business purposed. For example, the ATM withdrawals and checks in summarized in Exhibit 2 pp.10-11 were used to pay the costs of operating the business and the $7,019 withdrawn from the WCDC account in placed in Duke's personal account was used to purchase inventory for either WCDC or OWCDC. The testimony of Lily Graham, Craig Ainge and Jamie Clawson did not reveal any improprieties. There was a lot of disagreement over what store had what level of inventory, but never a showing that inventory, revenues or profits had been

taken or converted by Duke or Zavala. Also, Craig Ainge testified of discrepancies between sales and deposits but could not make a connection or establish that Duke or Zavala converted the differences in amounts to their personal use. The burden of proof as to the lost profits claims is on the Claimants who, in the opinion of the arbitrator, did not meet their burden with the accounting testimony furnished by Craig Ainge, Jamie Clawson or Lily Graham.

10. In addition to the initial investment of $75,000 by R. Graham and $60,000 by D. Graham (the only cash invested in WCDC) R. Graham provided for additional capital and security at his personal expense which was used to purchase inventory and pay the operating expenses of WCDC. Among the financial contributions R. Graham provided the following:

    a. Guaranty of the five year Draper lease at a cost of approximately $14,000 per month – which obligation included the balance of the tenant improvement money ($102,000) that was used to pay for company expenses and inventory.
    b. $47,000 personal loan December 3, 2003 used for inventory, shipping and general company expenses.
    c. Line of credit for $100,000 established in May, 2004 secured by a lien on the R. Graham home.
    d. $75,000 Joe Groot loan
    e. $75,000 Leo Pavich loan
    f. $50,000 family loan to R. Graham used for company expenses
    g. $10,000 Washington Mutual loan used for company expenses
    h. undetermined – personal and RDG credit cards

11. In addition to the capital R. Graham infused into WCDC he accrued salary of $60,098 and his wife, Lily, accrued salary of $18,000. D. Graham accrued salary of $36,000.

CONCLUSION

The arbitrator confirms that this Award is a complete disposition of all the issues submitted to him under the terms of the Amended and Restated Operating Agreement of Way Cool Dirt Cheap dated July 18, 2003 ("Operating Agreement"), and the Order of Hon. Bruce C. Lubeck, District Court Judge, of February 23, 2005, evidence and legal arguments on which issues was presented at the hearings held in Salt Lake City, Utah on June 13 & 14, 2005; July 21, 22, 23, 24, 2005; and July 29, 2005.

DATED 8/11/05

Kent B. Scott

Kent B. Scott, Arbitrator

ADDENDUM EXHIBIT 4

TED DUKE, ET AL,
Plaintiff-Appellant,
VS
RANDAL GRAHAM,
Defendant-Appellee.

DECEMBER 30, 2005

INDEX
DISTRICT COURT NO. 040925274
SUPREME COURT NO. 20051036-SC

EXHIBITS

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TED DUKE, an individual; and MARIA DEL CARMEN SAVALA CARDENAS, an individual, Plaintiffs, vs. RANDALL GRAHAM, an individual; DAVID GRAHAM, an individual; and CRAIG R. MARIGER, in his capacity as purported arbitrator herein, Defendants.	Case No. 040925274

TRANSCRIPT OF HEARINGS

February 22, 2005
August 17, 2005
August 24, 2005
September 13, 2005
October 14, 2005

BEFORE THE HONORABLE JOHN PAUL KENNEDY
District Court Judge

Jeri Kearbey
Certified Court Transcriber
1230 Gaylene Circle
Sandy, Utah 84094
(801) 566-4549

364

TO: The Utah Supreme Court
SCOTT M. MATHESON COURTHOUSE
450 South State Street
Salt Lake City, Utah 84111

Attention: Pat Bartholomew

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TED DUKE, an individual; and MARIA DEL CARMEN SAVALA CARDENAS, an individual, Plaintiffs, vs. RANDALL GRAHAM, an individual; DAVID GRAHAM, an individual; and CRAIG R. MARIGER, in his capacity as purported arbitrator herein, Defendants.	0409252274 Case No. 20051036-SC

Notice is hereby given that on the 6th day of December 2005, a transcript of proceedings held before The Honorable John Paul Kennedy, District Court Judge, on February 22; August 17; August 24; September 13 and October 14, 2005 in the above case were completed and delivered to the managing reporter at the Third Judicial District Court in and for Salt Lake County, State of Utah.

DATED this 6th day of December 2005.

Jeri Kearbey
Certified Court Transcriber
566-4540

cc: Nick J. Colessides, Attorney
David R. Williams, W&K
Clerk of the Court

FILED DISTRICT COURT
Third Judicial District

DEC - 7 2005

SALT LAKE COUNTY

By _____
Deputy Clerk

SALT LAKE CITY, UTAH; FRIDAY, OCTOBER 14, 2005, 2:05 P.M.

-ooo0ooo-

THE COURT: Good afternoon.

MR. COLESSIDES: Good afternoon, sir.

THE COURT: Apparently, we had a matter scheduled that didn't get on our calendar today. We apologize for the delay. Counsel, do you want to state your appearances?

MR. COLESSIDES: Nick J. Colessides appearing on behalf of the plaintiffs, Your Honor.

MR. WILLIAMS: David Williams appearing on behalf of the defendant, Your Honor.

THE COURT: Okay. We have a couple of matters that are, apparently, pending. One's a proposed order confirming the arbitration award, and we have also, as I see the file, a motion by the plaintiffs to vacate the arbitrator's award. That was filed back in August.

Okay. Are there other matters that are — to consider today?

MR. COLESSIDES: Your Honor, yes. There's a couple of matter.

Insofar as — and the minor item is something we agreed upon between Mr. Williams and myself. As it relates to the truck which was already returned to the credit union, we made the agreement that Mr. Duke may take — because there's no equity in the truck, Your Honor — may take the

authority.

THE COURT: So your position is, even if Arbitrator Scott made a mistake as to the law, that doesn't matter.

MR. WILLIAMS: That's right.

THE COURT: And that, as long as the question of law was before him properly under the award, whether he decided correctly or not, it doesn't make any difference.

MR. WILLIAMS: That's right. The court has to confirm his award if it was within the scope of his authority.

THE COURT: Mr. Colessides says there was a mistake as to law because he's telling him — he's saying, in essence, that the arbitrator can replace a manager here. So, first of all, let's deal with that question. Did the arbitrator replace the manager?

MR. WILLIAMS: No.

THE COURT: Okay. So your position is, even if Mr. Colessides is correct, that the arbitrator can be — his award can be vacated if he makes a mistake of law, he didn't make a mistake of law anyway because he didn't replace the manager. Okay.

MR. WILLIAMS: What he did was expel the members.

THE COURT: Okay. Can you do that under the law?

MR. WILLIAMS: You can. What the statute says is

MR. COLESSIDES: Yes. May I, Your Honor?

THE COURT: Go ahead.

MR. COLESSIDES: On the first issue that the Court inquired, Your Honor, the arbitrator exceeds his authority by acting in manifest disregard of the law. That's a case in the state of Utah, and we have it in our brief, Your Honor.

And what we're suggesting to the Court at this time, Your Honor, is that, as one looks at the award — and the award is very specific. It only has 16 lines. And what it does, it says that it expels Mr. Duke and Mr. — and Ms. Cardenas as members, number one. And it expels Mr. Duke as a manager.

We respectfully suggest to the Court that the law of the state of Utah is that you cannot either expel a member or expel a manager of a limited liability company except by judicial proceedings. And, specifically, the court — the statute itself says that the district court clerk shall take the necessary — once the court finds that an expulsion is proper, the district court clerk shall notify the director of corporations of the State of Utah to show that that person has been expelled as a — as a member or a manager.

This is what we call, Your Honor, that the arbitrator exceeded his authority manifestly, because he's

MR. COLESSIDES: 2001.

THE COURT: And the section dealing with vacating the award was last changed May 15th, 2003. So, it would seem to me that, if that's true, that — you know, the legislature obviously could have changed that. They could have stuck in some language that would have modified it or, you know, qualified it some way. They didn't do that. If there's a — if there's a technical problem regarding notifying the State — or the corporations department, I would assume that, when the — when the order is confirmed by the Court, which is the prerogative of either party to the arbitration award, I assume, then if it's necessary to notify the State at that point, they can be notified.

And, in that sense, I suppose it is even qualified as a judicial determination. But I don't see — I don't see this as exceeding the arbitrator's award. And if that's the only issue that we're talking about, I would — I would find that, as a matter of law, that that does not exceed the arbitrator's authority.

Do you have — is there another point where you think —

MR. COLESSIDES: The only point I'm making, Your Honor, is I don't quite know if that specific version of the — the specific portion of the Act, Exceeding Authority, is not — does not — precedes 2001 and may go back to 1990.

I don't know which part or which language was changed, Your Honor.

THE COURT: I don't think it's necessary to even focus that specifically on line by line. It just — these two sections were both reviewed at those times, and I think the legislature, if they wanted to change it, they could have changed it. And so the one that's in effect at the latest date is the one that gives the broadest authority, I think, to the arbitrator. And, certainly, I think the purpose of the arbitration code is — that portion of the code is — dealing with arbitration is to relieve burdens from the court, to provide alternative ways of resolving disputes. And to interfere with the arbitrator's authority, I think, would undermine the whole purpose of that. And rather than make it a facilitating provision, it would become even worse, more complicated in the end, I think.

So, again, I would — I would find and rule as a matter of law that — that, in this instance, with respect to the removal of members or managers, that the arbitrator did not exceed his authority, that that was within his authority.

I don't — I would find, further, that it's not a manifest violation of the law, because of what I've said about the timing of the law.

It may also not be a manifest violation of the law

judgment as well as attaching it as an exhibit, just so that I would be sure to comply with that rule.

THE COURT: So you're not adopting by reference, you're just repeating verbatim everything in the award.

MR. WILLIAMS: Yeah.

THE COURT: So your representation to me and to Mr. Colessides is that, other than misspelling "judgment," you have copied everything verbatim, including nothing more, and leaving out nothing, than is set forth in the award, other than the beginning statements and the concluding signatures.

MR. WILLIAMS: Yes, Your Honor. There may be — oh, there is one — there is one change. On page 4 —

THE COURT: All right.

MR. WILLIAMS: — right under where it says "Arbitrator's Written Comments."

THE COURT: Uh-huh.

MR. WILLIAMS: "At the request of the parties, the arbitrator is..."

THE COURT: Uh-huh.

MR. WILLIAMS: I inserted that language because he used — I think he named himself or "I am." He said, "At the request of the parties, I am providing..."

THE COURT: Okay. So —

MR. WILLIAMS: And just by bracket, I said the

arbitrator is rather than saying "I am."

THE COURT: All right. Okay. Well, it would appear to me that this is in order. I don't know that it does anything different from signing the confirmation order that I've signed. So I'm going to go ahead, unless Mr. Colessides wants to state some other substantive objection.

MR. COLESSIDES: I have not had an opportunity, Your Honor, to review it. I just looked at it as it was given to me.

THE COURT: All right. I'm going to sign it. I'll give you — if you need 30 days to — if you want to raise an objection, I'll be happy to let you do it.

MR. COLESSIDES: Thank you, Your Honor.

THE COURT: Okay. Okay. Again, I want to compliment counsel on both sides. I think you've both done a superb job in trying to educate the Court and brief this matter. I think your representation of your clients has been vigorous and has been thorough. I compliment both of you on that. I wish everybody who came in did such a thorough job.

Obviously, in these cases, one side prevails and one side doesn't prevail. In this case, it would appear to the Court that the defendants have prevailed and they would be entitled to your relief under that — under that

conclusion.

I would just reiterate what I said. I think I've arbitrated personally over the years, as an advocate, maybe 150 arbitration cases. I have served as an arbitrator also on a number of cases. And I feel that it is a — it is a good system, but one of the reasons it's good is because the award of the arbitrator has such a potential finality. And in this instance, it's obvious that the plaintiffs don't agree with what the arbitrator did and, you know, that's their prerogative. But that doesn't mean that it shouldn't be enforced under the law.

So, again, thank you. I compliment you on what you've done. And, unless there's something further, we'll be in recess.

MR. COLESSIDES: Thank you, Your Honor.

MR. WILLIAMS: Thank you, Your Honor.

(Whereupon, at the hour of 3:06 p.m., the hearing was concluded.)

-ooo0ooo-

CERTIFICATE OF SERVICE

Filed **ten** copies of the foregoing, one of which contains an original signature, with the Clerk of the Supreme Court:

OFFICE OF THE CLERK OF THE COURT
SUPREME COURT OF THE STATE OF UTAH
450 SOUTH STATE STREET, FIFTH FLOOR
SALT LAKE CITY, UTAH 84111-1860

and served **two** copies of the foregoing upon the following:

David R. Williams (Attorney for all defendants herein)
Woodbury & Kesler, PC
265 East 100 South, Suite 300
Salt Lake City, Utah 84110-3358

via first class mail, postage pre-paid, this 13th day of February, 2006, addressed as set forth above.